89- 1370



No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

MERCEDES L. GACETA, AND NORMAN R. VUNCK,
*Petitioners,*

*v.*

COUNTY OF SANTA CLARA, *et al*
*Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Mercedes L. Gaceta
Norman R. Vunck
Pro se
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February 1990

## QUESTIONS PRESENTED

The California Constitution provides no Fourth Amendment "probable cause" hearing for misdemeanor arrestees and statute limits "probable cause" hearings to only those who are encarcerated prior to arraignment.

A California magistrate is a position created by statute whose jurisdiction is specified by statute and who need not be a member of the bar.

The misdemeanor complaint against petitioners was dismissed due to lack of jurisdiction.

Petitioners appeared specially before a magistrate, prior to arraignment, under express statutory provisions to object to the jurisdiction of the court. The magistrate rejected petitioners special appearance, did not comply with the statutory requirement that the magistrate either discharge arrestees or issue a warrant for arrest, and orally ordered bailiffs to seize petitioners and place them in jail, which bailiffs did, without a warrant.

1. The question is, whether the magistrate, under the above conditions is entitled to absolute judicial immunity to a suit claiming civil damages arising from his acts.

2. The question is, whether a police officer who charges a person with a crime for which he knew that he did not have probable cause, and the magistrate did not issue a warrant, is immune to a suit for damages arising from his acts.

3. The question is, whether a federal employee who made a citizen's arrest for trespassing on a road in which neither he nor the United States had any possessory interest is immune to suit for damages directly under the Constitution because he did not know the road was open to the public.

## LIST OF PARTIES RULE 28.1

The parties to the proceedings below were the Plaintiffs, Mercedes L. Gaceta and Norman R. Vunck.

The Defendants were John Alan Koone, a federal employee, John C. Contreras, a Santa Clara County Deputy Sheriff, Kevin J. Murphy and Nancy Hoffman, judges of the Municipal Court of Santa Clara County, Georgia Anderson, a bailiff, James Sugiyama, a court reporter, Steven Woodside, a county attorney and the County of Santa Clara, California.

All of the above named are respondents before this court.

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## OPINIONS BELOW

The opinion of the court of appeals is not reported and appears in Appendix A. The memorandum decisions of the United States District Court for the Central District of California (Aguilar, R.P.) appear in Appendices as follows: Koone; App. B, Murphy; App. C, Hoffman and Sugiyama; App. D, Anderson, Contreras, Woodside and Santa Clara County; App. E.

## JURISDICTION

Invoking federal jurisdiction under the First and Fourth Amendments of the U.S. Constitution and 42 U.S.C. Sec. 1983, the petitioner brought this suit in the Central California Division of the Ninth District Court on June 21, 1985 against one federal and several state employees. In the period July 25, 1985 to September 8, 1987, the District Court issued a series of summary judgments dismissing all of the defendants.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 17, 1989. A timely petition for rehearing was denied on October 13, 1989. Petitioner's motion for enlargement of time to file this Petition for Certiorari was partially granted on December 12,

On December 12, 1989, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including February 10, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

**U.S. Constitution, Amendment I**

**Restrictions on the Power of Congress**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Constitution, Amendment IV**

**Seizures, Searches and Warrants**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**United States Code, Title 42:**

**Sec. 1983. Civil Action for Deprivation of Rights.**

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE[1]

Norman R. Vunck and Mercedes L. Gaceta are husband and wife. Vunck has lived in the Santa Clara County for thirty years and Gaceta, for 21 years. Neither heretofore had any criminal record.

Ms. Gaceta is employed as a business analyst for a large retailer and has a masters degree in mathematics from Saint Louis University, Manila, Philippine Islands.

Mr. Vunck is a business operations analyst and electronics computer engineer. He spent ten years as a consultant to the General Staff of 5th Air Force in Japan. He has been program manager for several military engineering and development projects such as the F-105 Weapons System, Minuteman Missile Program, Mariner Deep Space Probe, and the Midas Stationary Geo-orbiting Satellite Program. Mr. Vunck is generally familiar with Air Force Regulations and General Services Administration (GSA) procurement and divestiture policies and procedures.

Mercedes Gaceta and Norman Vunck were arrested for trespassing. In period from June 24 to September 21, 1984 when the following events occurred, Gaceta and Vunck were engaged in establishing an electronic engineering and manufacturing business in Canada. Due to being held in constructive custody for two months and forced to appear at several hearings in the Municipal Court and forcing them to engage in extensive legal research in order to prepare legal documents, Vunck and Gaceta were prevented from traveling to Canada to attend to vital business operations, which caused Vunck and Gaceta to suffer an out-of-pocket loss of

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1. Note (numbers) refer to references to the record listed in the Appendix of Docket References.

over fifteen million dollars.

The Municipal Court misdemeanor complaint charging Vunck and Gaceta with trespassing was terminated in favor of Vunck and Gaceta three months after their arrest, by dismissal of the charges for lack of jurisdiction.(9)

A federal employee, Dwayne Alan Koone arrested petitioners Vunck and Gaceta by citizen's arrest for trespass on Mt. Umunhum Road, a road which leads to state owned public park land.(19, 7.1) The public is generally invited to use the public park land by publicly distributed brochures, and is invited to use Mt Umunhum Road to reach the park land.(18, 21) Neither the federal employee Koone nor the Federal Government had any possessory interest in either Mt. Umunhum Road or the land underlying the road.(29, 23)

Mt. Umunhum Road is open to the public by every definition.

A County deputy sheriff, John Contreras, responded to a call for assistance from Koone.(7.3, 19) Contreras filed a verified misdemeanor complaint against Vunck and Gaceta in the Municipal Court charging Vunck and Gaceta with misdemeanor trespassing based upon information from the federal employee Koone: a misdemeanor which the deputy sheriff Contreras states in a declaration, he did not witness and for which states he had no authority to make an arrest.(7.3, 19, 8)

The affidavit in the complaint filed with a magistrate in the Municipal Court by Contreras stated:

"PC 602(n)(2) TRESPASSING"

No affidavits or any other information were included with the complaint.(8)

The U.S. Supreme Court and California Supreme Court have held that *all misdemeanor arrestees* are entitled by the U.S. Constitution Fourth Amendment to a hearing to determine if there is probable cause for their arrest. *Gerstein v Pugh* (1975) 420 US 103, 111 - 114; 43 L Ed 2d 54; 95 S Ct 854; *In re Walters*, (1975) 15 C 3d 738, 742; 126 CR 239; 543 P 2d 607,

However, California Penal Code Section 991 Procedures

for Determining Probable Cause, restricts Fourth Amendment "probable cause" hearings to only those misdemeanor arrestees who are encarcerated at the time they appear before the magistrate at arraignment.

Vunck and Gaceta were not encarcerated and therefore under the provisions of PenC § 991, were not entitled to a hearing to determine if there were probable cause for their arrest.(7.3, 19, 8)

The United States Supreme Court and the California Supreme Court have held that *every defendant* has a Fourth Amendment Constitutional right to a pretrial hearing to challenge the veracity of an affidavit underlying a complaint. *Franks v Delaware* (1978) 438 US 154, 437; 98 S Ct 2674; 57 L Ed 2d 667; *People v Smith* (1983) 34 C 3d 251, 258-9.

In the case of a misdemeanor, neither the California Constitution nor the California Legislature provide a direct statutory forum within the Penal Code whereby a person arrested without a warrant for an alleged misdemeanor may challenge the probable cause for their arrest, or challenge the veracity of the affidavit in the complaint filed against them.

The California Penal Code Section 853.9(b) Filing Complaint After Citation, states that a complaint is legally sufficient if it is written on a form approved by the Judicial Council and a Penal Code number triable in the municipal court is written legibly on it.

For a misdemeanor, the only method within the Penal Code whereby an illegal arrest and unconstitutional complaint may be challenged is by a motion for arrest of judgment after trial and conviction. No redress whatsoever is available for those who are tried and found innocent. See California Penal Code Section 1012.

In order to claim their Constitutional rights to due process of law, Vunck and Gaceta appeared specially before the magistrate and initiated statutorily mandated special proceedings in the Municipal Court of Santa Clara County, California under the provisions of California Code of Civil Procedure § 418.10, Objection to Jurisdiction, to assert that the court did not have personal jurisdiction over them

because Vunck and Gaceta were illegally arrested and because the complaint filed against them was unconstitutional.(14)

The People of California, prosecuting attorney, did not object to petitioner's motion initiating a special appearance before the magistrate. (He was not present in the court room.(13)

Judge Kevin Murphy, by his own admission, was sitting as a magistrate.(12.1) A magistrate is not a court and is not a judge. *People v Peters* (1978) 21 C 3d 749, 753; 147 CR 646; 581 P 2d 651; *People v Flemming* (1981) 29 C 3d 698, 703; 175 CR 604; 631 P 2d 38; *Johnson v MacCoy* 278 F2d 37, 38 (9 Cir 1960). And the filing of a complaint with a magistrate does not initiate a criminal proceeding, it is merely an application for a warrant. *People v Case* (1980) 105 CA 3d 826, 833-4; 164 CR 826; *People v Lee* Look (1904) 143 C 216; 76 P 1028.

The magistrate, Kevin Murphy, stated that it was legally impermissible for a defendant to make a special appearance to challenge the jurisdiction of the Municipal Court and refused to recognize the special appearance of petitioners or the statutorily mandated special proceeding under CCP § 418.10, to determine if there were probable cause for the arrest of petitioners or if the complaint filed against them were Constitutional.(11)

The magistrate did not read a charge to petitioners, set bail at $4000, the magistrate did not issue statutorily and Constitutionally mandated arrest warrants for petitioners before he orally ordered the bailiffs to seize Vunck and Gaceta.(11, 15)

The bailiffs seized Vunck and Gaceta without warrants and at the County Jail, the bailiffs charged Vunck and Gaceta with *trespassing in the municipal court*, took their pictures and fingerprints, removed all their clothing and personal possessions, attached prison identification to their bodies, issued prison clothing and bedding, encarcerated them in prison cells together with convicted prisoners and entered all of this information in the state's permanent criminal

computer data base.(15)

## REASONS FOR GRANTING THE WRIT

This case is important because the outcome effects the Fourth Amendment rights of all of the citizens of California. The sections of the California Penal Code,[2] as they pertain to misdemeanors,[3] are effectively a "Catch 22" which not only prevent citizens from obtaining their Fourth Amendment Constitutional rights to pretrial determination of the sufficiency and veracity of the complaint lodged against them, as held by the U.S. Supreme Court in both *Franks v. Delaware* and *Gerstein v. Pugh, (supra)* but also prevent citizens from redress for denial of their right to due process of law.

The criminal complaints against Vunck and Gaceta filed in the Municipal Court of Santa Clara, which is the wellspring of this civil rights action, were dismissed due to lack of jurisdiction. If the Municipal Court did not have jurisdiction at the end of the proceedings, it clearly did not have jurisdiction at the beginning.

## ARGUMENT

### I. The Road Upon Which Mercedes Gaceta and Norman Vunck Were Arrested For Trespassing Is Open To The Public By All Measures Of Definition

Santa Clara County is known as Silicon Valley and is situated thirty-five miles south east of San Francisco, California. Mt. Umunhum (An indian word meaning "hummingbird".) is the highest peak in the Santa Cruz Mountains to the south, which contains the valley.(29)

There is a road called Mt. Umunhum Road which extends from the valley floor to the top of Mt. Umunhum.

In 1955, the Air Force established an early warning radar station on the peak of Mt Umunhum called Almaden Air Force Station. The Air Force built a dependent housing facility on the Air Station for the families of the military

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2. See Appendix, Analysis of Penal Code Sections.) as they pertain to misdemeanors

3. 763,882 non-traffic cases in 1988: 1989 Annual Report, Judicial Council of California.

personnel stationed there.(3)

In 1981, the Air Force closed the Air Station and relinquished jurisdiction to the General Services Administration for disposal as surplus property.(6)

In the absence of United States acquisition of Federal jurisdiction over land purchases in accordance with 40 USC 255, . . . *Federal jurisdiction over acquisitions*, the laws governing real estate owned by the United States government is controlled by the laws applicable to real estate in the state in which the property is located under the provisions of 18 USC 13, *Laws of states adopted for areas within federal jurisdiction. Smith v Cap Concrete, Inc.*, 113 CA 3d 769; 184 CR 308 (1982)

The General Services Administration Attorney's Final Title Opinion states at paragraph 2:

> "2. Legislative jurisdiction of the United States of America: There is no evidence that the United States has accepted partial or exclusive jurisdiction over the land in accordance with Section 255 revised statute, amended 1 February 1940, 54 Stat. 10; Act of 9 October 1940 (54 Stat. 1083; 40 USC 255). It is therefore concluded that the United States has only proprietorial jurisdiction."(20)

At the time that the Air Station was built in 1955, the U.S. Army Corps of Engineers purchased by Grant Deed, in the name of the United States, from each of seven fee holders, "Rights of Way for the purpose of a road" over an existing dirt road and paved the road that extended eleven miles through uninhabited country from the valley floor to the peak of Mt. Umunhum.(22, 20, 4)

When an easement is founded upon a grant, only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee. The owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement. *Hoyt v Hart* (----) 149 C 722; 87 P 569; *Pasadena v California - Michigan etc. Co.* (1941) 17 C 2d 557, 578-9.

In the absence of express restriction in a grant, it

> seems that all persons who can be regarded as having permission, express or implied, to enter on the dominant tenement, may use a way for the purpose of access to such tenement and of egress therefrom. Consequently, members of the family of the dominant owner, his servants and employees, his guests, and tradesmen and other persons with whom he does business, may do so. Such persons are not guilty of trespass in using the way, and the owner of the easement would, it seems, have a right of action in case there was an interference with the use of the way by a member of one of these classes. *Law of Real Property*, Gallaghan & Co. (1939), H.D. Tiffinay - Property 3d ed. Ch. 14, Sec. 803, Vol 3, p. 322, §326 Rights of way based on grants - Rights as to use. (Citations omitted.); *Pasadena v California - Michigan etc. Co.* (1941) 17 C 2d 557, 578-9.

There is no restrictive language whatsoever in any of the grant deeds to the U.S. Government for a right of way *"for the purpose of a road"* for Mt. Umunhum Road.(22)

In California, a right of way *"for the purpose of a road"* which is obtained by grant deed is a special kind of right of way which is *"open and unobstructed"*, precludes erecting any gates or obstructions across the road, and shall be open to the public unless explicitly qualified in the Grant Deed by some adjective such as *"private"*. *(Sidney V. Smith v Grace E. Worn* (1892) 93 C 206, 214.) In California, a right of way for a road owned by any governmental entity is a public road and whoever uses the road within the grant is not a trespasser. *People v Sweetser* (1977) 72 CA 3d 278, 285, disapproved on other grounds: *Labor*: 29 C 3d 307; 172 CR 720; 625 P 2d 263.

The Mid-Peninsula Regional Open Space District (MPROSD) is a political subdivision of the State of California.(32) The publicly stated purpose in the charter under which MPROSD was established by the voters by public election, was to preserve open space for the recreational use of the public.(18)

Mt. Umunhum Road has existed as a road since 1906.(30) and is appurtenant to the land owned by MPROSD *(Hewitt v Meaney* (1986) 181 CA 3d 361; 226 CR 349) and in addition, in 1952, when the U.S. Corps of Engineers bought the right of way over Mt. Umunhum Road from Frances C. Diterich, she explicitly included a clause in the grant, which gave her and her heirs and assigns, joint usage of Mt. Umunhum Road with the Federal government.(5) In 1980, four years prior to this incident and a year prior to the closing of the Almaden Air Force Station, MPROSD obtained this property, which has a common boundary with the entire eastern end of the Almaden Air Station,(31) from the estate of Frances C. Diterich. This land is included in the park land open to the public.(18)

The purchase of an easement over the property of another does not convey to the purchaser (dominant tenement) any rights to title or *possessory interest* in the land over which the easement traverses (servient tenement). The right of the dominant tenement (United States) on the easement is no greater than that of the servient tenements (land owners) *Carstans v California Coastal Comm.* (1986) 182 CA 3d 277, 287; 227 CR 135; *Elliott v McCombes* (1941) 17 C 2d 23, 30; 109 P 2d 329; 20 ALR2d 796, *Effect of provisions designating or referring to persons entitled to use right of way created by express grant.*

Whether an easement is appurtenant or in gross, it is not personal property. *Balestra v Button* (1942) 54 CA 2d 192, 197; *Callahan v Martin,* 3 C 2d 110, 121-2; 43 P 2d 788; 101 ALR. 871.)

From 1972 to 1984, MPROSD had accumulated more than 5000 acres of park land at the summit of Mt. Umunhum to which the public is generally (specifically) invited and the public is invited to use Mt. Umunhum Road to reach the park land.(18, 21)

In order for a road to become a public road through prescription the road must be subject to open and notorious adverse use for a period of five years. California Code of Civil Procedure Sec. 321. *Taormino v Denny* (1970) 1 C 3d

679; 83 CR 359; 463 P 2d 711. After Mt. Umunhum Road was paved by the U.S. Corps of Engineers, it remained open to the public and wholly unrestricted during the nearly thirty years that the Air Station was in operation.(33, 34)

At the time that Vunck and Gaceta were arrested by Koone, the General Services Administration and the Mid-Peninsula Regional Open Space District each owned rights of way over Mt. Umunhum Road for the purpose of a road (5) and these are both government entities. The rights of way were both appurtenant and en gross.

Subsequent to the closing of Almaden Air Station, one of the land holders, Loren McQueen, built a gate across the road to prevent the public from reaching communications antennas at the summit of Mt. Umunhum, which he owns.(35, 29, 23)

**II. When Dwayne Koone Arrested Vunck and Gaceta He Not Only Did Not Have Probable Cause To Make The Arrest, He Violated Every Provision Of The Law Under Which He Made The Arrest.**

> "... resolution of the question [of the lawfulness of the arrest] requires a particularized evaluation of the conduct of the officers involved." *Rios v United States*, 1960, 364 US 253, at page 255, 80 S Ct 1431, at page 1433, 4 L Ed 2d 1688.

The Ninth Circuit has stated in *Ward v United States*, 316 F2 113 (9 Cir 1963):

> "The procedure for making arrests which obtains under the state practice is applicable to arrests made for crimes against the United States." *Cline v United States*, (9 Cir 1925) 9 F2 621, and cases cited; "No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. *United States v Di Re*, (1948) 332 US 581 at 591, 68 S Ct 222 at 227, 92 L Ed 210."

Dwayne Koone is a federal employee. He made a citizen's arrest of Vunck and Gaceta without a warrant to enforce a state statute, Penal Code § 602(n)(2), Trespassing.(10)

The employment contract of Dwayne Alan Koone does

not include making arrests for any purpose. The job description states at paragraph e. "Serves as security guard at site by reporting to supervisor and county sheriff any trespassers on the property."(39)

A citizen may arrest another for a misdemeanor only when the offense has actually, in fact, been committed or attempted and also has been committed in his presence. *Cervantez v J.C.Penny Co*, (1979) 24 C 3d 579, 587; 156 CR 198; 595 P 2d 975; *Carroll v United States* (1924) 267 US 132, 156 - 157; *United States v Watson* (1976) 423 US 411, 423, Note 5b; 46 L Ed 2d 598; 96 S Ct 820.

The United States Attorney filed a statement with the District Court stating that Dwayne Alan Koone was on official duty at the time that he made the arrest of Gaceta and Vunck.

The California Supreme Court has held that there is no duty to make a false arrest. *People v Curtis* (1969) 70 C 2d 347, 354; 74 CR 713; 450 P 2d 33; *People v Craig* (1881) 59 C 370.

On Sunday, June 24, 1984, Mercedes Gaceta and Norman Vunck were traveling on their motorcycle on Mt. Umunhum Road. Near the summit they came to a gate crossing the road(36) built by Loren McQueen separating the property of McQueen (Tract A-104E-2) from that of his neighbor to the south, the heirs of L.A.F. Grippenstraw (Robert Barlow) (Tract A-105E-1) (See maps and tract register copies of which have been lodged with the clerk.)(29, 23) Mr. Vunck approached the gate from the south. (Tract A-105E-1).

On the north side of the gate, on the property belonging to Loren McQueen (Tract A-104E-2), Dwayne Koone sat in a civilian pickup truck with U.S. Government license plates and no other marking.(11.1, 19) The McQueen gate(36) is shown on the map of the U.S. Army Corps of Engineers(29, 23) to be 0.82 miles on Mt. Umunhum Road from the gate which enters Almaden Air Station (Tract A-100-2)(38) which was the place of employment of Dwayne Koone.(38)

When Mr. Vunck approached Dwayne Koone, Mr. Koone stated that Mr. Vunck was trespassing on *private property*

and would have to leave. When Mr. Vunck refused to leave, Dwayne Koone said to his companion, John Woody: "Call the sheriff and tell them that we have another citizen's arrest."(19, 11.1)

John Woody departed to call the sheriff. Santa Clara County Deputy Sheriff John Contreras has stated in his Sheriff's Incident Report and in his Declaration(19, 11.1) that he received a radio message that two persons had been taken into custody at Mt. Umunhum Road and was ordered to proceed to that place.

As soon as John Woody departed to call the sheriff, Mr. Koone opened the McQueen gate, drove his truck to the south of Mr. Vunck's motorcycle onto the Grippenstraw property and blocked the only road by which Vunck and Gaceta could have left the scene with his truck, preventing Mr. Vunck and Ms. Gaceta from leaving.(20, 29, 23) Mr. Koone stated that if Vunck and Gaceta attempted to leave, that he would drive them off the road with his truck. At that moment Vunck and Gaceta had been seized and were in the custody of Koone. *People v Cheatham* (1975) 50 CA 3d 592, 595; 123 CR 361, Note 1; *Tennessee v Garner* (1984) 417 US 1, 7; 85 L Ed 1, 105 S Ct 1694; *Reid v Georgia* (1980) 448 US 438, 440; 65 L Ed 2d 890; 100 S Ct 2752.

Once a seizure has occurred, it continues throughout the time the arrestee is in custody of the arresting officers *Robins v Harum* 773 F2d 1004, 1010 (9 Cir 1985).

While Norman Vunck and Mercedes Gaceta were in the custody of Dwayne Koone they proceeded through the gate on foot, about 150 feet onto the property of Loren McQueen at which point they stopped and returned to the truck occupied by Dwayne Koone on the Grippenstraw property and asked Dwayne Koone to confirm that they were under arrest.(7.2, 19) To which question Dwayne Koone told Mercedes Gaceta and Norman Vunck that they were under citizen's arrest. Mercedes Gaceta and Norman Vunck then returned to the property of Loren McQueen and walked to the top of the hill out of the sight of Dwayne Koone. The hill on Loren McQueen's property is separated from the

Almaden Air Station by a deep gorge which Vunck and Gaceta did not cross.

The Declaration of John Contreras and the Sheriff's Incident Report states that Vunck and Gaceta walked 150 feet onto *Air Force Property* however, Vunck and Gaceta claim, and the U.S. Army Corps of Engineer maps show that the property north of the McQueen Gate is the property of Loren McQueen (Tract A-104E-2) and not the Almaden Air Force Station property belonging to the General Services Administration (Tract A-102). The U.S. Army Corps of Engineer maps show that the former Air Force Station is 0.8 miles from the gate at the boundary of the property of Loren McQueen and property of Frances Grippenstraw, where Koone arrested Vunck and Gaceta.

The Ninth Circuit Court has stated in *Ward v County of San Diego County*, 791 F2 1329, 1332 (9 Cir 1986): "Law enforcement officials must be cognizant not only of how far their authority extends, but also of the point at which their authority ends." and " *Capeoman* places the responsibility for keeping abreast of constitutional developments in criminal law squarely on the shoulders of law enforcement officials.", quoting *Capeoman v Reed*, 754 F2d 1512, 1514 (9 Cir 1985)

It is the officer's responsibility to know what he is arresting for, and why. *US v Di Re* (1947) 332 US 581, 595.

John Woody returned and sat in the truck with Dwayne Koone. Some time thereafter (about two hours), Santa Clara County Deputy Sheriff John Contreras arrived.

The record shows that Vunck and Gaceta were on a road where the public is invited. The record shows that neither Koone nor the General Services Administration were in sole, legal possession of the road where Koone arrested Vunck and Gaceta. The record shows that Vunck and Gaceta did not receive two separate warnings to leave the land, one from the person in sole, legal possession of the road where Vunck and Gaceta were arrested and a second warning from a police officer. Koone had no probable cause to arrest Gaceta and Vunck.

Defendant Koone has not refuted any of the evidence presented to the court.

## III. John Contreras Filed A Misdemeanor Complaint In The Municipal Court Based On Hearsay From John Koone And For Which, He Stated In A Declaration, He Knew He Did Not Have Probable Cause To Arrest Gaceta and Vunck.

At the request of Koone, Deputy Sheriff John Contreras issued a "NOTICE TO APPEAR / COMPLAINT" to both Norman Vunck and Mercedes Gaceta.(7.3, 19,8)

If a statute has been judicially construed, such construction of the statutory words becomes part of the statute "as if it had been so amended by the legislature." *Cramp v Board of Public Instruction* (1961) 368 US 278, 285; 82 S Ct 275; 280, 7 L Ed 2d 285; *Select Base materials v Board of Equal.* (1975) 51 C 2d 640, 645; 335 P 2d 672.)

A complaint in an inferior court of limited jurisdiction must contain an affirmative allegation of every single fact necessary to describe the crime charged in order to confer subject matter jurisdiction on the court. *Antilla v Justice's Court of Big River Township* (1930) 209 C 621, 624. Held: A complaint, in order to meet Fourth Amendment requirements must describe the totality of the circumstances surrounding the crime. *Illinois v Gates* (1983) 462 US 213; 103 S Ct 2317; 76 L Ed 527. And a complaint based solely upon statutory language may be constitutionally inadequate if sufficient allegations of probable cause are not otherwise present. *In re Walters* (1975) 15 C 3d 738, 748; 126 CR 239; 543 P 2d 607; *People v Sesslin*, 68 C 2d 418, 424-425; 67 CR 409; 439 P 2d 321.

If a complaint, in its charge against defendant, completely fails to include some element essential to the description of a criminal act and commitment has issued out of a court of inferior grade, the lack of jurisdiction is established. *In re Meisner* (1939) 30 CA 2d 290, 292; *Ex parte Greenall* (1908) 153 C 767; 96 P 804; *In re Alonzo* (1979) 87 CA 3d 710; 151 CR 192, 195; *Rogers v Superior Court of Alameda County* 46 C 2d 3, 7; 291 P 2d 929.

The NOTICE TO APPEAR / COMPLAINT issued to Vunck and Gaceta by John Contreras states that the address

of the incident is No. 1 Mt. Umunhum Road, the address of Almaden Air Station which the U.S. Army Corps of Engineer maps show to be 0.8 miles from where Vunck and Gaceta were arrested, across the intervening property of two different land owners.

The description of the crime on the affidavit of the NOTICE TO APPEAR / COMPLAINT states:

"602(n)(2) PC TRESPASSING"

No other information appears on the complaint and no affidavits accompany it.

Penal Code Sec. 602(n)(2) Trespassing, does not apply to persons who are using a right of way belonging to *ANY* government entity within the scope of the initial grant. *People v Sweetser,* (1977) 72 C.A.3d 278, 285; 140 C.R. 82; *Porter v City of Los Angeles* (1920) 182 C. 515, 518-9; 189 P. 105.

The necessary required elements of the crime of trespassing as defined in PenC 602(n)(2) are:

1. The place trespassed upon is not open to the general public.

2. The person making the complaint is either the owner, the agent of the owner, or the person in lawful possession of the property trespassed upon.

2a. It is only the person who is in lawful possession of the property who is the proper person to complain about trespassing. *Smith v Cap Concrete* (1982) 133 CA 3d 769, 774; 184 CR 308; *Lightner Mining Co. v Lane* (1911) 161 C 689, 694; 120 P 771)

2b. The person making the complaint must have exclusive right of possession of the property. *Smith v Cap Concrete* (1982) 133 CA 3d 796, 744; 184 CR 308; *People v Sweetser,* (1977) 72 CA 3d 278, 285; 140 CR 82.

2c. An essential element of the charge of trespassing is that two warnings to leave the property must be given to the trespassers, one from the person in exclusive lawful possession of the property and a second from a police officer. *People v Medrano* (1978) 78 CA 3d 198, 215; 144 CR 217.

Neither the citizen's arrest by Dwayne Koone nor the affidavit in the complaint filed by John Contreras fulfills one single necessary element to describe the crime of trespassing in accordance with PenC 602(n)(2).

The affidavit on the complaint does not state that the NOTICE TO APPEAR / COMPLAINT was issued pursuant to PenC 837, a citizen's arrest by Dwayne Koone.

John Contreras did not check the box on the NOTICE TO APPEAR / COMPLAINT to indicate that the NOTICE TO APPEAR / COMPLAINT was issued "On Information And Belief".(8)

PenC 142 Officer Refusing to Receive or Arrest Criminal, requires that an officer accept a person arrested by a private citizen but no law requires the officer to either issue a NOTICE TO APPEAR / COMPLAINT as a result of an arrest by a citizen, *Opinion of the Attorney General* (1969) Vol. 52, p. 65 nor does any law require the officer to sign a NOTICE TO APPEAR / COMPLAINT. *People v Maggoria* (1962) 207 CA 2d Supp. 908, 910.

John Contreras stated in his declaration that he did not see Vunck or Gaceta commit a misdemeanor and had no authority to arrest Vunck and Gaceta for trespass.(7.5) Nevertheless, Contreras personally verified the complaint against Vunck and Gaceta and on July 12, 1984, filed the complaint with the magistrate of the Santa Clara County Municipal Court for the purpose of obtaining a warrant for the arrest of Vunck and Gaceta.(25)

California Penal Code Section 170 Maliciously Procuring Warrant to Search or Arrest, forbids Contreras to obtain a warrant for arrest for a misdemeanor which he did not personally witness. *Carroll v United States* (1924) 267 US 132, 156 - 157; *Map v Ohio* (1961) 367 US 643, 651, 655; *Malley v Briggs* (1986) 106 S Ct 1092, 1098.

"The information in the complaint or affidavit in support of an application for a warrant for arrest must either (1) state facts within the personal knowledge of the affiant or complainant directly supportive of allegations in the complaint that the defendant committed the offense; or (2)

when such stated facts are not within the personal knowledge of the affiant or complainant, further state facts relating to the identity and credibility of the source of the directly incriminating information." *In re Walters* 15 C 3d 738, 748; 126 CR 239; 543 P 2d 607; *People v Cressey* (1970) 2 C 3d 836, 842; 87 CR 699; 471 P2 19.

Under the admonition of *Walters* 15 C 3d 738, 748, the complaint filed by John Contreras is clearly insufficient.

Vunck and Gaceta were released by Deputy Sheriff Contreras subsequent to having been issued a Notice to Appear / Complaint verified by John Contreras.(7.6)

Under these circumstances, John Contreras has not only violated the Fourth Amendment rights of Gaceta and Vunck in that an application for a warrant must be based upon probable cause, John Contreras has violated PenC § 170 and is not entitled to immunity from civil liability for his actions. *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396.

## IV. California Misdemeanor Arraignment Procedures Statutorily Denies Fourth Amendment Due Process Of Law.

The United States Supreme Court and the California Supreme Court have held that *every defendant* has a Fourth Amendment Constitutional right to a pretrial hearing to challenge the veracity of an affidavit underlying a complaint (*Franks v Delaware* (1978) 438 US 154, 437; 98 S Ct 2674; 57 L Ed 2d 667; *People v Smith* (1983) 34 C 3d 251, 258-9) and to determine if there is probable cause for his arrest which hearing may only be waived by knowledgeable consent. *Gerstein v Pugh* (1975) 420 US 103, 111 - 114; 43 L Ed 2d 54; 95 S Ct 854; *In re Walters*, (1975) 15 C3 738, 742; 126 CR 239; 543 P 2d 607. However, California Penal Code Section 991 Procedures for Determining Probable Cause, restricts Fourth Amendment "probable cause" hearings to only those misdemeanor arrestees who are encarcerated at the time they appear before the magistrate at arraignment.

The U.S. Supreme Court in *Gerstein* at p. 124-5 explicitly left to each state the method and procedure by which a

probable cause hearing for those accused of a misdemeanor would be effectuated.

Contained in In re *Walters* at p. 747-8, the California Supreme Court has laid out specific instructions (*California Pretrial Procedures*) to the committing magistrate for implementing a hearing to determine if there is probable cause for the arrest of *all persons* charged with a misdemeanor. The instructions are explicit as to time and method to conduct the hearing and are to *apply to every person charged with a misdemeanor* unless the hearing is waived by knowledgeable consent and so noted in the docket record.

The mere fixing of bail does not satisfy the requirements of *Gerstein*, at p. 125 fn, 26 and *Walters*, p. 750.

PenC 991 was enacted in 1980, five years after the Supreme Court holdings in (*Gerstein*) and (*Walters*). Since the legislature is presumed to know of rulings of the courts, it must be presumed that the legislature, in adopting PenC § 991, meant to limit the citizens rights to due process of law. *People v Ward* (1986) 188 CA 3d Supp 11, 14-15; 235 CR 287

The Municipal Court Docket Sheet is required to list the Constitutional rights which were actually given to defendants at arraignment. *In re Smiley* (1967) 66 C 2d 606, 617; 58 CR 579, 586. The pre-printed list of Constitutional Rights in the Docket Sheet of the Municipal Court does not include the requirement for notification of a *Gerstein / Walters* "probable cause" hearing.(25)

The County of Santa Clara is responsible for printing the Docket Sheets and the omission of notification of a misdemeanor arrestee's Fourth Amendment Constitutional right to a probable cause hearing and the operation of PenC § 991 certainly expresses the County's policy of routinely denying this right to arrestees who are not incarcerated at the time they appear before the magistrate. *Monell v New York City Dept of Soc. Srvcs.* (1978) 436 US 658, 691-2.

Neither Vunck nor Gaceta were informed by Kevin Murphy of their right to a pretrial hearing to determine probable cause for their arrest nor to a pretrial hearing to

challenge the veracity of the affidavit underlying the complaint charged against them.(11.1)

Vunck and Gaceta did not waive their rights to a pretrial hearing to determine if there were probable cause for their arrest. The municipal court docket sheet for Vunck and Gaceta contains no notation of waiver of a "probable cause" hearing by Gaceta or Vunck. Waiver of Constitutional rights cannot be presumed by silence of the record. *In re Johnson* (1965) 63 C 2d 325, 334; Johnson v Zerbst (1938) 304 US 458, 464; 58 S Ct 1129; 82 L Ed 1461.(25)

The only time that a challenge to the jurisdiction of a court may be made is prior to a general appearance and entry of a plea or demurrer, at which time the warrant becomes functus officio. *U.S. v Ford* (1926) 273 US 593, 606; 47 S Ct 531; *People v Smith* (1850) 1 C 9, 11; *Rescue Army v Municipal Court* (1946) 28 C 2d 460, 463-4; 171 P 2d 8.

A demurrer to the complaint filed by Contreras would never be sustained because, due to the interaction of California Penal Code sections 740, 853.9(b), 950, 1004, and 1012, a demurrer to a misdemeanor complaint written legibly on a form approved by the Judicial Council is legally sufficient if two conditions are met: 1) The complaint is written on a form approved by the Judicial Council and 2) only the name of a section of the California Penal Code appears on the complaint. *People v Heldt* (1985) 163 CA 3d 532, 536; 209 CR 579. See Appendix: Analysis of Penal Code Sections.

**V. The Right To Due Process Is Absolute.**

Even though the Penal Code did not authorize a pretrial hearing to determine probable cause for the arrest of Gaceta and Vunck, the right to due process is absolute ( *Carey v Piphus* (1978) 435 U.S. 247, 266 - 267; ) and not discretionary. *Sallas v Muni Ct of San Leandro* (1978) 150 CR 543, 546; *Keeler v Superior Court* (----) 2 C 3d 619, 635; 87 CR 481; 470 P 2d 617.

A court has the jurisdiction to determine its own jurisdiction and it may use any appropriate means to effectuate that proceeding. Cal. Civil. Proc. Code Sec. 187

(West 1982). *People v Chew Lan Ong* (1904) 141 C 550, 552-3.

Code of Civil Procedure Sec. (CCP §) 418.10, Objection to Jurisdiction, is the only statute in California by which a person charged with a misdemeanor who is not incarcerated in jail may obtain a pretrial hearing to claim their Constitutional Fourth Amendment right to challenge the veracity of the affidavit underlying a complaint or to determine if there is probable cause for the arrest of defendants. This statute must be used prior to any general appearance, either plea or demurrer.

## VI. Magistrate Kevin Murphy Did Not Obtain Personal Jurisdiction Over Vunck And Gaceta By Means Of Their Special Appearance Under The Provisions Of Code Of Civil Procedure 814.10

Where a statute provides a special remedy for use in specified cases, a party seeking the remedy may look to the special statute for a definition of his rights. *Brill v Los Angeles County* (1941) 16 C2 726; 108 P2 443. *Boggs v North American Bond & Mortgage Co.* (1937) 20 CA2 316; 66 P2 1253.

July 23, 1984 was the last day upon which Vunck and Gaceta could have entered a plea to the misdemeanor complaint filed against them by John Contreras.(8, 27) Vunck and Gaceta were not in custody and the time and thereby statutorily denied a hearing under the provisions of PenC § 991, to determine if there were probable cause for their arrest.

CCP § 418.10(a) explicitly states that a challenge of jurisdiction under this section may be made on or before the last date upon which a plea must be entered and § 418.10(b) states that when a motion challenging the jurisdiction of the court is made under CCP § 418.10, the date upon which a plea must be entered is automatically extended to a date fifteen days subsequent to the date of filing and service upon the defendant of an order by the magistrate denying the challenge of jurisdiction.

The special appearance of Vunck and Gaceta, made for

the purpose of challenging the personal jurisdiction of the court did not confer upon Kevin Murphy, personal jurisdiction over Vunck and Gaceta. *Goodwine v Superior Court* (1965) 63 C 2d 481, 484; *Olcese v Justice's Court* (1909) 156 C 82, 88. The notes of the California Judicial Council appended to CCP § 418.10 explicitly state that a challenge of jurisdiction under CCP § 418.10 does not confer upon the court the personal jurisdiction of the defendant whenever a defendant appears only for the purpose of challenging the jurisdiction of the court. *CCP § 418.10, Notes of Judicial Council.*

Since the special proceeding brought by Gaceta and Vunck to claim their civil rights was not brought in the name of The People, it was a civil proceeding. *Ex parte Tom Tong* (1883) 2 S Ct 871; 108 US 556; 27 L Ed 826.

Once Vunck and Gaceta challenged the jurisdiction of the Municipal Court, all that was necessary to establish prima facie false imprisonment was to show that they were arrested without a warrant at which point it is incumbent upon the plaintiff to prove jurisdiction. *Hughes v Orb* (1951) 36 C 2d 854, 858; 288 P 2d 550; *People v Privett* (1961) 55 C 2d 698, 700; 12 CR 874; *Cervantez v J.C.Penny* Co, (1979) 24 C 3d 579; 156 CR 198; 595 P 2d 975.

**VII. A Magistrate Is Neither A Court Nor A Judge. The Jurisdiction Of A Magistrate It Limited By Statute. Kevin Murphy, By His Own Admission Was Sitting As A Magistrate.**

The person before whom a person arrested for the commission of a misdemeanor without a warrant, is not a judge but a magistrate. PenC § 849 Duty of Officer to Take Accused Before Magistrate - Release from Custody or PenC § 853.6(a) Citations for Misdemeanors Under State law - Release or Nonrelease. *Wells v Justice Court* (1960) 5 CR 204, 206; *People v Cohen* (1897) 118 C 74, 78; 50 P 20; *People v Brite* 9 C 2d 666, 685; 72 P 2d 122.

Kevin Murphy, by his own admission contained in an affidavit of James Sugiyama, the court reporter, was sitting as a magistrate at the hearing of Vunck and Gaceta on July

23, 1984.(12.1)

There is no presumption of regularity of the proceedings which surround a magistrate. *People v Cohen* (1897) 118 C 74, 78.

When John Contreras filed a criminal complaint with a magistrate in a Municipal Court, he *did not invoke the jurisdiction of any court* or institute a criminal proceeding. *In re Geer* (1980) 108 CA 3d 1007, 1005; *People v Case* (1980) 105 CA 3d 826, 830; 166 CR 912, 914-5; *People v Crespi* (1896) 115 C 50, 54; 46 P 863. A magistrate is not an inferior court, a superior court, or a competent court because there is no trial jurisdiction. *People v Peters* (1978) 21 C 3d 749, 753; 147 CR 646; 581 P 2d 651.

PenC § 807 defines a magistrate as "an officer having power to issue a warrant for the arrest of a person charged with a public offense." A magistrate has the additional function, limited by statute, of determining whether there is sufficient or probable cause to hold an accused for trial. *People v Uhlemann* (1973) 9 C 3d 662, 667; 108 CR 657.

A magistrate presides at an arraignment which is established by operation of the Legislature and the Penal Code sections 853.6 and 976. *People v Crespi* (1896) 115 C 50, 54; 46 P 863.

A magistrate need not be a member of the bar (*People v Uhlemann* (1973) 9 C 3d 675, 667; 108 CR 657) and it may be the court clerk or prosecuting attorney who sits as magistrate at an arraignment. (Penal Code Sec. 988)

**VIII. Kevin Murphy, Sitting As A Magistrate, Without Either Personal Jurisdiction Over Petitioners Or Subject Matter Jurisdiction Over The Offense, Refused To Examine The Complaint Before Him To Determine If There Were Probable Cause To Issue An Arrest Warrant And Orally Order The Arrest And Incarceration Of Petitioners Without A Warrant.**

On July 23, 1984, Vunck and Gaceta appeared by special appearance in conformity with California Code of Civil Procedure 418.10 in the Municipal Court before Judge Kevin

Murphy, who was sitting as a magistrate, to challenge the jurisdiction of the Municipal Court.(12)

When Gaceta and Vunck appeared before Magistrate Kevin Murphy to challenge the jurisdiction of the court, their appearance was a "special appearance" whether they said so or not ( *Lander v Flemming* (1874) 47 C 614, 616.) and it was error to deny that privilege. *Lyman v Milton* (1872) 44 C 630, 635.

Both Vunck and Gaceta filed written and oral motions with points and authorities together with affidavits supporting their special appearance(28) and challenging the jurisdiction of the Municipal Court stating that the court did not have personal jurisdiction over Vunck and Gaceta because Dwayne Koone was not a person authorized to make an arrest under the provisions of Penal Code Section 602(n)(2).(28) *Smith v Cap Concrete*, Inc., 113 CA 3d 769, 774; 184 CR 308 (1982)

Vunck and Gaceta also stated that the jurisdiction of an inferior court, once challenged, was required to be proven by the person who is invoking the jurisdiction of the court, in this case, the People of California. *McNutt v General Motors* (1936) 298 US 178, However, John Contreras stated in an affidavit that he knew that he did not have probable cause to arrest Gaceta and Vunck.(7.5)

No objection to the motion of Gaceta and Vunck challenging the jurisdiction of the Municipal Court was made because among other things, there was no District Attorney or representative of the People of California present at the hearing.(12.2)

A special appearance, as established by statute Code of Civil Procedures § 418.10, is a special proceeding defined in Code of Civil Procedures § 22. *In re Central Irr. Dist*, 117 C 382; 40 P 354. Jurisdiction of special proceedings are only such as are created and authorized by statute and Kevin Murphy, in the exercise of this jurisdiction, was limited by the terms and conditions under which the proceedings were authorized. *Smith v Westerfield* (1891) 88 C 374, 379; *Woods-Drury, Inc. v Superior Court* (1936) 18 CA 2d 340, 344; 63 P

2d 1184; *Lay v Superior Court,* 11 CA 558, 560; 105 P 775.

Magistrate Kevin Murphy stated that it was legally impermissible to make a special appearance when one is a defendant, for the purpose of challenging the jurisdiction of the court.(11)

Kevin Murphy did not convene a hearing to determine the jurisdiction of the court as required by California Code of Civil Procedure Section 418.10(b) nor comply with the provisions of Section 418.10(c) of the statute which requires the magistrate to file and serve upon the defendant a written order of the court denying [not rejecting] the motion challenging the jurisdiction of the court, nor did Kevin Murphy comply with any other provisions of CCP 418.10.(11)

Kevin Murphy denied Gaceta and Vunck their right to due process of law to challenge the veracity of the affidavit contained in the complaint filed by John Contreras as guaranteed by the Fourth Amendment of the U.S. Constitution. *Franks v Delaware* (1978) 438 US 154, 437; 98 S Ct 2674; 57 L Ed 2d 667; *People v Smith* (1983) 34 C 3d 251, 258-9.(11)

Kevin Murphy denied Gaceta and Vunck their right to a hearing to determine if there were probable cause for their arrest as guaranteed by the Fourth Amendment of the U.S. Constitution and mandated by the California Supreme Court. *Gerstein v Pugh* (1975) 420 US 103, 111 - 114; 43 L Ed 2d 54; 95 S Ct 854; *In re Walters,* (1975) 15 C3 738, 742; 126 CR 239; 543 P 2d 607.(11)

Kevin Murphy violated the provision of CCP § 418.10(b) which states that the date for entering a plea to the initial complaint is automatically extended 15 days subsequent to the date of filing and service upon the defendant of an order by the court denying defendant's motion challenging the jurisdiction of the court by insisting that both Vunck and Gaceta then and there, enter a plea in response to the complaint filed by John Contreras.(11)

Vunck entered a plea, Gaceta did not; she remained mute until the provisions of CCP § 418.10 were met.

Kevin Murphy set bail of $2000 for each Gaceta and

Vunck and orally ordered the bailiffs to seize Vunck and Gaceta.(11)

As a magistrate, Kevin Murphy had no inherent power to arrest Gaceta and Vunck or place them in jail. *Pousson v Superior Court In and For San Diego County* (1958) 165 CA 2d 750; 332 P 2d 766. The Fourth Amendment of the U.S. Constitution states that there shall be no searches or seizures without a warrant based upon probable cause.

Kevin Murphy did not make a determination whether or not there was probable cause underlying the warrantless arrest of Vunck and Gaceta by Dwayne Koone, or the filing of a complaint by John Contreras as required by § PenC 853.6(f) and *Gerstein v Pugh* (1975) 420 US 103, 111 - 114; 43 L Ed 2d 54; 95 S Ct 854; *In re Walters*, (1975) 15 C3 738, 742; 126 CR 239; 543 P 2d 607.

Kevin Murphy did not either discharge Vunck and Gaceta or issue a warrant for their arrest in response to the complaint filed by Contreras as required by PenC § 853.6(f) and § 1427 and the Fourth Amendment of the U.S. Constitution.(26)

Immediately upon the verbal order of Kevin Murphy, Vunck and Gaceta were seized by the bailiffs without a warrant and transported to the County Jail, and charged by the bailiffs with *trespassing in the Municipal Court on July 23, 1984*.(15)

Jail guards took the photographs and fingerprints of Vunck and Gaceta, took their clothing and possessions, attached prison identification tags to their bodies, and issued prison bedding and clothing to them and they were then placed in a prison cells together with convicted prisoners and entered this information in the County's permanent criminal computer data base.

Vunck and Gaceta paid $4000 bail and were released from the County Jail.(11, 16)

In the case of Vunck, Murphy set a trial date.(17) In the case of Gaceta, who remained mute and refused to enter a plea, Kevin Murphy entered a notation in the record that Gaceta was mentally incompetent and set a date for further

arraignment before Judge Nancy Hoffman, who was sitting as a magistrate.(1)

Vunck and Gaceta petitioned the Federal District Court for removal of their case from the Santa Clara County Municipal Court to the Federal District Court on the basis that they were being denied due process of law and it was unlikely that they could obtain their rights. The District Court never acted upon the petition. County Counsel Woodside, on behalf of Murphy and Contreras, filed a secret motion in opposition to the petition for removal by filing their motion with a false Certificate of Service. The People of California did not oppose the motion.

## IX. Magistrate Kevin Murphy Does Not Have Absolute Judicial Immunity And Is Not Immune To Civil Liability For Damages For Depriving Gaceta And Vunck Of Their Fourth Amendment Rights.

Kevin Murphy, as a magistrate was acting independently from his jurisdiction as a judge of the Municipal Court. His powers and jurisdiction came from the Constitution, operating with the acts of the Legislature on the subject (*People v Cohen* (1897) 118 C 74, 78) and was a different office from that of a judge; as one conferred by statute, not by district election. *People v Flemming* (1981) 29 C 3d 698, 703; 175 CR 604; 631 P 2d 38; *Johnson v MacCoy* 278 F2d 37, 38 (9 Cir 1960).

Kevin Murphy engaged in no adjudicatory acts. Only qualified immunity from liability and damages attaches for executive functions that judges may be assigned by law to perform; it is the nature of the function performed - adjudication - rather than the identity of the actor who performed it - judge - that determines whether absolute immunity attaches to the act. *Forrester v White* (1988) 108 S Ct 538, 543 - 545.

Every single act of Kevin Murphy was illegal: qua illegal. Kevin Murphy's qualified immunity defense depends upon the objective legality of his conduct as measured by references to clearly established law. No other circumstances are relevant to the issue of qualified immunity. *Harlow v*

*Fitzgerald* (1982) 457 US 800, 190 - 197. Officials may lose their immunity by violating "clearly established statutory ... rights." 457 US at 818.

It is settled law that Kevin Murphy had a duty to construe Penal Code sections in harmony with the requirements of *Gerstein* and *Walters*, supra,) so as to give effect to each, which he did not do. *Morse v Municipal Court* (1974) 13 C 3d 149, 159; 118 CR 14; 529 P 2d 46; *People v Tideman* (1962) 57 C 2d 574, 583; 21 CR 207; 370 P 2d 1007.

Murphy was bound to know the law, and cannot be received to plead ignorance of it. *Town of South Ottawa v Perkins* (1876) 84 US 260, 269. Kevin Murphy cannot be held to have been exercising judicial discretion unless all the evidence and material facts and circumstances concerning the complaint before him were both known and considered, together with legal principals essential to an informed, intelligent and just decision. *Martin v Alcoholic Beverage etc. Appeals Bd.* (1961) 55 C 2d 867, 878; 13 CR 513; 362 P 2d 337; *People v Davis* (1984) 161 CA 3d 796, 805; 207 CR 846. Since he did not convene a hearing to determine this information, he did not have it.

**X. Hearings Subsequent to Kevin Murphy**

Gaceta had two further hearings before Judge Nancy Hoffman, who was sitting as a committing magistrate. At each of these hearings, Gaceta renewed her petition challenging the jurisdiction of the court. Hoffman stated that she agreed with Murphy that Gaceta was mentally incompetent and refused to acknowledge Gaceta's motion challenging the jurisdiction of the court. Gaceta refused to enter a plea until the requirements of CCP 418.10 were discharged so Nancy Hoffman entered a plea of not guilty on behalf of Gaceta and set a trial date.(2)

The charges against Vunck and Gaceta were dismissed for lack of jurisdiction on September 21, 1984, three months after their arrest.

## CONCLUSION

No person should be stripped of the constitutional protections afforded by the Fourth Amendment, or deprived of the remedy 42 U.S.C. § 1983 provides to redress violations of those protections, unless there are compelling reasons for insulating the wrongdoer from liability. No such reasons exist with respect to a civilian groundskeeper who arrests a traveler in violation of every single precondition for a valid arrest under the section of the penal code he made the arrest or a police officer who filed a verified complaint for a misdemeanor he not only did not witness but for which he stated in a declaration that he knew he had no probable cause for making the arrest, which violated Califonria Penal Code § 170 and the Fourth Amendment rights of petitioners.

The position of magistrate is not a position within the Judicial system of the government. The magistrate before whom petitioners appeared not only violated every single statute he was charged with upholding as well as lying to petitioners from the bench in order to deprive petitioners of their Fourth Amendment Constitutional rights by fraud and deceit, he did more. He orally ordered the bailiffs to encarcerate petitioners when he knew he did not issue a warrant for the arrest of petitioners. The bailiffs charged petitioners with trespassing in the Municipal Court.

The charge against petitioners was dismissed due to lack of jurisdiction. That lack of jurisdiction could only eminate from the fact that the arrest by Koone and the complaint filed by Contreras were illegal, depriving the magistrate of jurisdiction over the offense. Petitioners appeared specially and did not submit to the personal jurisdiction of the court. Under those circumstances, the magistrate had neither subject matter jurisdiction nor personal jurisdiction. The magistrate did not engage in any adjudicatory process for which he could claim judicial immunity.

Due to the acts of all of the respondents, petitioners were detained in California for three months which prevented from timely concluding their business in Canada and causing them to forfeit fifteen million dollars in investment capital.

Respectfully submitted,

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Norman R. Vunck,
Pro se

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Mercedes L. Gaceta,
Pro se.

# APPENDIX A

The following document carries a stamped mark which reads
"FILED AUG 17 1989
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CLERK U.S. COURT OF APPEALS"
NOT FOR PUBLICATION

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

MERCEDES L. GACETA; NORMAN R. VUNCK,
Plaintiffs-Appellants,
vs-
UNITED STATES OF AMERICA*; SANTA CLARA COUNTY; DWAYNE ALAN KOONE; JOHN DOE WOODY; JOHN DOE CONTRERAS; KEVIN J. MURPHY; NANCY HOFFMAN; JANE DOE ANDERSON; JAMES R. SUGIYAMA; DOES 1 through 50, inclusive,
Defendants-Appellees.

No. 87-2787
D.C. No.
CV-85-20386-RPA
MEMORANDUM

Appeal from the United States District Court
for the
Northern District of California
Robert P. Aguilar,
District Judge, Presiding
Argued and Submitted June 28, 1989
San Francisco, California

Before: WALLACE, POOLE, and HALL,
Circuit Judges.

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* The United States was not a defendant.

# APPENDIX A

Gaceta and Vunck (Gaceta) appeal from summary judgment in their action brought against various defendants arising out of an arrest on Mt. Umunhum Road in Santa Clara County. The district court had jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §1343. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. §§1291 and 1294. We affirm.

1.

In order to state a section 1983 claim against a public entity, the claimant must establish that the public entity had an official policy, custom or practice which caused the claimants to be deprived of their constitutional rights under the color of state law. Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690-95 (1978). According to the record, Gaceta was unable to produce evidence that the County of Santa Clara had any such "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Id. at 690. Instead, Gaceta, without any supportive facts, merely attributes the actions of county employees to the policies and customs of the county. Therefore, Gaceta failed to state a claim against the county, because a county "cannot be held liable solely because it employs a tortfeasor -- or, in other words, a [county] cannot be held liable under §1983 on a respondeat superior theory." Id. at 691 (emphasis in original).

Once the County pointed out that Gaceta had no basis to claim such a policy, practice, or custom existed on this essential element of the claim, Gaceta was then required to prove that a genuine issue of fact existed to avoid summary judgment. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539 (9th Cir. 1989) (en banc) (*Steelworkers*); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (*Celotex*). Gaceta made no such showing. Consequently, the district court was correct in granting summary judgment in favor of the County.

2.

# APPENDIX A

"To state a claim under §1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 108 S.Ct. 2250, 2255 (1988). "Private parties act under color of state law if they willfully participate in joint action with State officials to deprive others of constitutional rights." *Steelworkers*, 865 F.2d at 1540.

Gaceta repeatedly alleged that throughout the pendency of the state court litigation Koone was involved in a conspiracy to deprive him of his consitutional rights. However, Gaceta failed to allege that any of Koone's alleged acts in so conspiring took place under color of state law. Furthermore, Gaceta failed to allege any action taken jointly by Koone and state officials during the litigation. Once Koone pointed out this lack of evidence, the burden shifted to Gaceta to produce evidence that a genuine issue of fact existed on this essential element of the claim. Id. at 1543; *Celotex*. 477 U.S. at 322-23. Since there is no evidence in the record that Gaceta established a genuine issue of material fact as to this element, the district court was correct in granting summary judgment as to claims 6 through 27.

3.

Pursuant to 28 U.S.C. §2679, as amended by Public Law No. 100-694, upon certification by the attorney general that a federal employee was acting within the scope of his employment, "any civil action or proceeding commenced upon such a claim in a United States district court shall be deemed an action against the United States ...." 28 U.S.C. §2679(d)(1). Section 2679(b) provides that the Federal Tort Claims Act shall be exclusive remedy for such common law tort claims in such actions. These amendments to 28 U.S.C.. §2679 were expressly made effective for all actions pending on the date of the enactment of this Act, November 18, 1988. Pub. L. No. 100-694, §8(b), U.S. Code Cong. & Admin., 102 Stat. 4565-66 (1988).

Pursuant to 28 C.F.R. §15.3 (1988), the Attorney General, acting through United States Attorney Joseph P. Russoniello,

certified that Koone, a federal employee, was at all times acting within the scope of his employment with the federal government, in committing the acts complained of by Gaceta. Therefore, the district court was correct in finding that Koone was immune from suit for the common law pendent state claims.

4.

"[J]udges defending against §1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (quotation omitted). A judge is only subject to liability "when he has acted in clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978) (quotation omitted).

Gaceta alleged that Judges Hoffman and Murphy were liable under section 1983, among other things, for claiming personal jurisdiction over Gaceta in the state court action. The Municipal Court Judges had authority to hear Gaceta's misdemeanor criminal matters. Cal. Penal Code §§602 and 1462 (West 1982). Therefore, the judges also had authority to rule on jurisdiction in these matters. Cal. Civ. Proc. Code §187 (West 1982). Thus, Hoffman and Murphy were not acting in "clear absence of all jurisdiction" and were afforded absolute judicial immunity.

5.

Government officials are entitled to qualified immunity "to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (Harlow). This qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818, citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

Koone was acting as government employee in the actions complained of in claims 1 through 5. Assuming Gaceta states a *Bivens* claim, under the *Harlow* objective reasonableness standard, Koone would be protected by qualified immunity

as long as his conduct did "not violate a clearly established statutory or constitutional right [] of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. This qualified immunity extends to officers making an arrest. *Hutchinson V. Grant*, 796 F.2d 288, 290 (9th Cir. 1986) (*Hutchinson*). While Koone was not officially a "police" officer, part of his duty as a caretaker was to "[s]erve[] as a security guard at site by reporting to supervisor and county sheriff any trespassers upon property."

It is unclear from the record whether Gaceta enjoyed a clearly established right to travel on the road in question. The district court judge, relying upon a letter from the Midpeninsula Regional Open Space District (District), found that the right to travel on the road was at least subject to doubt. It was argued that there was a question regarding the existence of the easement based upon the 1964 County of Santa Clara Superior Court Case No. 150266, *Rood v. McQueen*, and that any easement presently in existence was created by the purchase of Almaden Air Force Base by the District following the incident in question. Gaceta argues that the easements were created in 1955 by a grant from the owners in fee. Based upon the record before us, we conclude the district court did not err in determining Gaceta did not prove there was a clearly established right to travel on the road in question.

In addition, even if a clearly established right existed, government officials would still be immune so long as the violated right was not a right of which reasonable person would have been aware. Koone approached Gaceta and asked whether he had observed "NO TRESPASSING" signs. He replied that he had observed the signs, but refused to leave. Koone advised Gaceta that he was trespassing on private property and asked him to leave. Deputy Contreras asked him if he had observed the signs. Gaceta stated that he had observed the signs and refused to leave. The Almaden Air Force Base contained a minimum of 99.99 acres. Therefore, the question is whether a reasonable caretaker of a deserted Air Force base, consisting of approximately 100 acres, should

have been aware of an easement despite the presence of a fence around the property, clearly posted no trespassing signs, and no indication of being informed by either Gaceta or the owner of the property that such an easement existed. See *Anderson v. Creighton,* 438 U.S. 635, 641 (1987) (recognizing that the objective reasonableness inquiry may be a fact intensive inquiry). We conclude that, given these facts, a reasonable caretaker neither would have nor should have known of the easement. Therefore, even if there was a clearly established right for Gaceta to travel on the road, a reasonable caretaker would not have known of this right, immunizing Koone for any violation of this right.

The two deputy sheriffs, John Contreras and Georgia Anderson, were likewise protected by qualified immunity, so long as they were acting within the objective reasonableness standard. *Hutchinson*, 796 F.2d at 290. Contreras was arresting Gaceta pursuant to a properly executed citizen's arrest. Cal. Penal Code §837.1 (West 1982). Anderson was acting upon the direction of a judge. Gaceta failed to offer any evidence that these official actions were in violation of any "clearly established" rights.

Sugiyama was the court reporter who transcribed the proceedings in the state court action. A court reporter is protected by qualified immunity in the course of his official conduct. *Green v. Maraio*, 772 F.2d 1913, 1018 (2d Cir. 1983). No evidence was presented which supported Gaceta's allegations that Sugiyama deliberately falsified the official record. Therefore, no evidence was presented that Sugiyama acted in violation of any of Gaceta's rights.

Steven Woods was the prosecuting attorney in the underlying action. Prosecuting attorneys are protected by absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976). Therefore, the district court was correct in dismissing the action against Woodside, since all of the actions complained of were committed in Woodside's official capacity as prosecutor. Even though the district court relied upon qualified immunity, the decision should be affirmed, since it is supported by the record. *Bruce V. United States*, 759

# APPENDIX A

F.2d 755, 758 (9th Cir. 1985).

The district court did not err in its determination that Koone, Sugiyama, Contreras, Anderson, and Woodside were entitled to qualified or absolute immunity.

AFFIRMED.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

APPENDIX A

Note: The document below bears a stamped mark which reads: "FILED OCT 13 1989 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS."
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| MERCEDES L. GACETA;<br>NORMAN R. VUNCK;<br>Plaintiffs-Appellants,<br>-vs-<br>UNITED STATES OF AMERICA; *<br>SANTA CLARA COUNTY;<br>DWAYNE ALAN KOONE;<br>JOHN DOE WOODY;<br>JOHN DOE CONTRERAS;<br>KEVIN J. MURPHY;<br>NANCY HOFFMAN;<br>JANE DOE ANDERSON;<br>JAMES R. SUGIYAMA;<br>DOES 1 through 50, inclusive;<br>Defendants-Appellees. | No. 87-2787<br>D.C. No.<br>CV-85-20386-RPA<br>ORDER DENYING<br>REHEARING |

Appeal from the United States District Court for the Northern District of California
Before: WALLACE, POOLE, and HALL, Circuit Judges.

Treating the petition for review of Gaceta and Vunck as a petition for rehearing, it is denied.

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*The United States was not a defendant.

# APPENDIX B

Docket 055
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MERCEDES L. GACETA
and
NORMAN R. VUNCK,
*Plaintiff,*
vs.
COUNTY OF SANTA CLARA, JOHN WOODY, DWAYNE ALAN KOONE, CONTRERAS, GEORGIA ANDERSON, NANCY HOFFMAN, KEVIN MURPHY, JAMES SUGIYAMA, and STEVEN WOODSIDE,
*Defendants.*

NO. C 85 20386 RPA
ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' VARIOUS MOTIONS TO DISMISS

This matter came before the Court on February 14, 1986, and April 11, 1986, for hearing on various motions to dismiss filed by defendants United States, Dwayne Koone, and the County of Santa Clara.

Having considered the memoranda and the First and Second Amended Complaints, and heard the argument of counsel and plaintiffs, and good cause appearing therefore, the Court orders as follows:

1. Defendant County of Santa Clara's Motion to Dismiss is granted, with leave to amend. Plaintiff has failed to plead the existence of a policy, custom, or practice of the County that cause plaintiffs to be deprived of their federal civil rights. *Monell v Department of Social Services*, 436 U.S. 658, 690 (1977).

2. By stipulation in open court, defendant United States' Motion to Dismiss is granted. Consequently, plaintiffs' Federal Tort Claims Act claim is rendered moot.

3. Plaintiffs' claim against defendant Dwayne Koone under 42 U.S.C. (1983 is dismissed because that statute provides a remedy only against officials acting under color of state law. There are no facts alleged to suggest that Koone was acting under color of state law.

4. Plaintiffs' second amended complaint contains 27 "causes of action." The first five of these allege sufficient facts to constitute short and plain statements of claims against defendant Dwayne Koone for Fourth Amendment violation pursuant to *Bivens*, conspiracy, false imprisonment, and assault. Therefore, defendant Dwayne Koone's motion to dismiss pursuant to Rule 8 is denied as to these five "causes to action" that state four claims.

5. "Causes of action" numbered 6 through 27 allege that defendant Koone conspired with the state defendants to commit all wrongful acts allegedly suffered by plaintiffs during their court hearing and jailing procedures. However, plaintiffs allege no facts to support such allegations. Any causal connection between defendant Koone's acts concerning plaintiffs' arrest and any subsequent wrongful acts by others is too tenuous to support holding Koone liable for "setting them in motion." Therefore, "causes of action" numbered 6 through 27 fall under Rule 8 and are dismissed as to defendant Koone only.

6. Defendant Koone will be given 30 days from the date of this order to respond to plaintiffs' second amended complaint.

IT IS SO ORDERED.
DATE: APRIL 11, 1986

/s/

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ROBERT P. AGUILAR
United States District Judge

# APPENDIX B

Docket No.113

## UNITED STATES DISTRICT COURT
## NORTHERN DISTRICT OF CALIFORNIA

MERCEDES L. GACETA
and
NORMAN R. VUNCK,
*Plaintiff,*

vs.

COUNTY OF SANTA CLARA, JOHN WOODY, DWAYNE ALAN KOONE, CONTRERAS, GEORGIA ANDERSON, NANCY HOFFMAN, KEVIN MURPHY, JAMES SUGIYAMA, and STEVEN WOODSIDE,
*Defendants.*

NO. C 85-20386 RPA
ORDER DISMISSING PLAINTIFFS' COMMON LAW TORTS AGAINST FEDERAL DEFENDANT KOONE

On June 26, 1986 at 2:00 p.m., the Court heard the regularly noticed motion of federal defendant Dwayne Alan Koone to dismiss the common law torts alleged against him in plaintiffs' first four "causes of action" contained in Plaintiffs' Second Amended Complaint. Samuel Wong, Assistant United States Attorney, appeared on behalf of defendant Koone. Norman Vunck and Mercedes Gaceta appeared *pro se*. The Court having received, read, and considered the papers submitted and heard oral argument in support, and in opposition, of the motion, and good cause appearing therefrom,

IT IS HEREBY ORDERED that plaintiffs' first four "causes of action" which allege, if anything, common law torts, are hereby dismissed with prejudice and without leave to amend against defendant Koone only on ground that he is absolutely immune from common law torts which he

allegedly committed within the perimeter of his line of duty. *Augustine v. McDonald*, 770 F.2d 1442, 1446 (9th Cir. 1985). See also *Ryan v. Bilby*, 764 F.2d 1325, 1328 (9th Cir. 1985); *Owynee Grazing Ass'n, Inc. v. Field*, 637 F.2d 694, 697 (9th Cir. 1981); *Clifton v. Cox*, 549 F.2d 722, 726 (9th Cir. 1977). Defendant Koone shall respond to the only remaining "cause of action" against him contained in plaintiffs' fifth "cause of action" within fifteen days of the date of this Order.

DATED: July 21, 1986

/s/

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UNITED STATES DISTRICT JUDGE

# APPENDIX B

**Docket No. 200**
**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| MERCEDES GACETA, et al., *Plaintiff,* v. DWAYNE KOONE, *Defendant,* | **C 85-20386 RPA ORDER GRANTING MOTION FOR SUMMARY JUDGMENT** |

## I. *PREFACE*

The sole remaining defendant in this case, Dwayne Koone, seeks dismissal of this 1983 lawsuit on the grounds of qualified official immunity. As explained below, the Court will grant the motion and dismiss the case.

## II. *FACTS*

Plaintiffs Mercedes Gaceta and Norman Vunck were arrested on June 24, 1984 while riding their touring motorcycle in the area of the Almaden Air Force Station on Mt. Umunhum in Santa Clara County. The individual who first stopped these motorcycling enthusiasts was defendant Koone. Koone apparently asked plaintiffs whether they had observed the "NO TRESPASSING" signs posted prominently along the road. When they replied that they had observed such signs, Koone asked them to leave the premises. Upon plaintiffs' refusal to leave, Koone called the Santa Clara County Sheriff's Department for assistance. During the time that Koone was calling for aid, plaintiffs proceeded through the gate at the entrance of the military base and walked around the premises. There was no violence. Apparently, it was all quite polite. Plaintiffs thought they had a right to be there and Koone insisted they did not.

After Koone arranged for the call to be made, plaintiffs returned to the entrance gate. Koone then placed plaintiffs under citizen's arrest. The word "placed" should be used with care, because it does not appear that Koone used any physical

restraint. It was strictly an intellectual exercise -- Koone doing his job and plaintiffs proving a point. In fact, the sheriff's report indicates that plaintiffs asked whether they were under arrest. Only at that time did Koone state that he was making a citizen's arrest. The events that followed are not relevant to this motion because the Deputy Sheriff and all other defendants have been dismissed from this action. Koone is the sole remaining defendant.

Mr. Koone is a civilian employee of the United States Air Force. His official title at the time of the incident in question was "Maintenance Worker," a job that entailed care and maintenance of the "pickled" Air Force facility on Mt. Umunhum,,the Almaden Air Force Station (hereafter, the "radar station"). Koone was employed to keep facilities in decent repair and free of vandalism pending immediate reopening or disposal to another agency. One of the elements of Koone's job description was to "[s]erve as [a] security guard at [the] site by reporting to [his] supervisor and [the] county sheriff any trespassers upon [the] property."

The United States ("U.S." or the "government") now has made a motion to dismiss the complaint on the grounds of qualified official immunity. The crucial question is whether Koone acted unreasonably in arresting plaintiffs.

III. *DISCUSSION*

(A) *Legal Background*:

Formerly, there were two elements to be proven in order to establish the affirmative defense of qualified immunity. Supreme Court cases had established a test incorporating both the objective and subjective circumstances of the official's actions. See *Gomez v. Toledo*, 446 U.S. 635, 641 (1980) ("The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether the official himself is acting sincerely and with a belief that he is doing right.") In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court jettisoned the subjective component of the test. Since *Harlow*, "officials are shielded from liability for civil damages insofar as their conduct does

not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Id.* at 818; *See also Davis v. Scherer*, 468 U.S. 183, 191 (1984) (quoting *Harlow*). Thus, whether Koone may prevail in his qualified immunity defense depends "upon the objective reasonableness of his conduct as measured by reference to clearly established law. "*Davis*, 468 U.S. at 191, 2 *quoting Harlow* at 818. "No other circumstances are relevant to the issue of qualified immunity." Id.

(B) *Analysis*:

As they have on prior occasions in this litigation, plaintiffs have done a fine job in preparing their own papers. Their research relating to easements and rights of access is more than respectable. Unfortunately, the relevant law is against them. At the time of the incident, the radar station properly belonged to the federal government. Furthermore, the land was not committed to a public purpose as testified to by the existence of the security gates and warning signs surrounding the land. Thus, plaintiffs did not have a right to enter the radar station properly itself. The only question is whether they had a right of easement across the federal property via Mt. Umunhum Road.

The evidence suggests that at best the question of whether an easement existed is subject to a reasonable doubt. The present owner of the radar station property is a group called Midpeninsula Regional Open Space District (the "District"). In response to a letter from a citizen regarding property, the district stated that it "is the only land owner to have deeded easement rights over Mt. Umunhum Road." The District went on to report that it has received a large volume of mail from people contending that a prescriptive easement had arisen over the roads in the Mt. Umunhum area, presumably including that portion of the road passing through the radar station. The point to be drawn from this response is that there exists some doubt as to the legal status of the easement across the radar station property, if such an easement exists at all. In light of this fact, defendant Koone acted reasonably both in instructing plaintiffs that the radar base was restricted public property

and in subjecting them to a citizen's arrest after plaintiffs intentionally entered the property.

Two additional points buttress this conclusion. First, the deputy sheriff who investigated Koone's call concluded that plaintiffs indeed were trespassing and he issued a citation to plaintiffs for that offense. Second, the incident report of the Sheriff's Department and the statements of the parties indicate that plaintiffs did not remain on Mt. Umunhum Road once they passed through the gate to the radar station property, i.e., they did not limit their access to the "easement" itself. Apparently, plaintiffs wandered off on some dirt trails for a brief period. Only upon their return from their wanderings and after they asked whether they were under arrest did Koone actually inform plaintiffs that they were under citizen's arrest. Once again, then, defendant Koone acted quite reasonably and in conformance with California law when he placed plaintiffs under citizen's arrest.

IV. *CONCLUSION*:

The undisputed facts show that qualified immunity is an available and dispositive defense in this case. Koone acted reasonably, obeying the law and not violating clearly established rights belonging to plaintiffs. Therefore, the Court HEREBY GRANTS defendants motion to dismiss.

IT IS SO ORDERED.

DATED: September 8, 1987

/s/

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ROBERT P. AGUILAR
United States District Judge

# APPENDIX C

Docket No. 115

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MERCEDES L. GACETA<br>and,<br>NORMAN R. VUNCK<br>*Plaintiffs,*<br>*vs*<br>COUNTY Of SANTA CLARA, et al.,<br>*Defendants* | NO. C 85 20386 RPA<br>ORDER DISMISSING DEFENDANT MURPHY |

The Court has reviewed defendant Kevin Murphy's motion to dismiss the second amended complaint and plaintiff's memorandum in opposition thereto. For good cause shown, the Court finds that defendant Judge Murphy acted within his jurisdiction as municipal court judge when plaintiffs appeared before him on the arraignment calendar. Accordingly, defendant Judge Murphy is absolutely immune from this lawsuit.

It is hereby ORDERED that the second amended complaint is dismissed with prejudice as to defendant Judge Murphy.

DATED: July 25, 1986

/s/

ROBERT P. AGUILAR
United States District Judge

# APPENDIX D

Docket No. 075

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MERCEDES L. GACETA
and
NORMAN R. VUNCK,
*Plaintiffs,*

COUNTY OF SANTA CLARA, et al,
*Defendants.*

NO. C 85-20386 RPA R.
ORDER GRANTING MOTIONS TO DISMISS

Defendants Municipal Court Judge Nancy Hoffman and court reporter James Sugiyama move to dismiss plaintiffs' second amended complaint as to them on the ground that they are immune from liability.

Having considered the memoranda submitted by both parties, reviewed the pleadings, and good cause appearing therefore, the Court finds as follows.

A judge is absolutely immune from liability for acts performed in her judicial capacity. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). A judge is subject to liability only when she has acted in the "clear absence of all jurisdiction." *Stump, supra* at 357.

Municipal Court Judge Nancy Hoffman, in finding plaintiff Gaceta incompetent to conduct her own defense, and in not accepting plaintiff Gaceta's claim of special appearance to challenge the jurisdiction of the municipal court, has not acted in the "clear absence of jurisdiction." The judge had authority to head plaintiff Gaceta's criminal matter and to rule on the issue of the jurisdiction of the court.

Accordingly, the Court hereby grants defendant Nancy Hoffman's motion to dismiss on the ground of absolute judicial immunity for acts performed in her judicial capacity.

Regarding defendant court reporter James Sugiyama, in their second amended complaint, plaintiffs allege that he deliberately falsified the transcripts of their July 23, 1984 arraignment hearing before Municipal Court Judge Kevin Murphy, in order to affect the outcome of the proceedings before this Court. They further allege that "Since there is no reason why [he] could have any personal interest in the content of the file, it must be presumed that someone else did."

Plaintiff thus allege no motive on the part of Sugiyama to falsify the transcript, and suggest that he acted pursuant to the instructions of someone superior to him, presumably Judge Kevin Murphy.

Qualified immunity will be a defense for the acts of the court reporter performed in the course of his official conduct. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); *Green V. Maraio*, 722 F.2d 1013 (2nd Cir. 1983) (court reporter who altered a trial transcript on the instruction of the judge was entitled to the defense of qualified immunity under 42 U.S.C. 1983 for actions carried out within the scope of the judge's instructions).

Accordingly, this court hereby grants defendant James Sugiyama's motion to dismiss on the ground of qualified immunity for acts alleged to have been performed within the scope of his official duties.

IT IS SO ORDERED.
DATED: May 14, 1986

/s/

ROBERT P. AGUILAR
United States District Judge

# APPENDIX E

Docket No. 190

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MERCEDES L. GACETA and NORMAN VUNCK,
Plaintiff,

vs.

COUNTY OF SANTA CLARA, DWAYNE KOONE, KEVIN MURPHY, NANCY HOFFMAN, JOHN WOODY, JOHN CONTRERAS, JAMES SUGIYAMA, GEORGIA ANDERSON (TODD) and STEVEN WOODSIDE
Defendants.

NO. C 85-20386 RPA
ORDER GRANTING CERTAIN DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The Court has received, read and considered the papers and pleadings submitted on the defendants' motion for summary judgment, and the Court has heard and considered the oral argument of counsel. Good cause appearing therefore, the Court finds and orders the following.

Initially, the Court notes that the plaintiffs have been acting in pro se in this action, and the Court generally commends them for their diligence in pursuing this action. The Court has endeavored to assist the plaintiffs in reaching the merits of their complaint by liberally construing their papers, pleadings and arguments and by instructing the plaintiffs of any deficiencies in their pleadings.

So, too, in this motion for summary judgment will the Court liberally construe the law and view the evidence in the light most favorable to the pro se plaintiffs here. The defendants here bear the burden of demonstrating the lack of

any triable issue of material fact in this matter and of thereby demonstrating that the defendants are entitled to judgment as a matter of law. The defendants must demonstrate that no reasonable jury could find for the plaintiffs under any reasonable interpretation of the evidence.

Each of four defendants move for summary judgment, and the Court will address each of their claims separately.

John Contreras

Defendant Contreras moves for summary judgment on the ground that he acted in good faith and in accordance with state laws when he cited the plaintiffs for trespass pursuant to the request of defendant Koone. The defendants argue that Contreras is entitled to the defense of qualified immunity. Contreras is a Deputy Sheriff with the Santa Clara County Sheriff's Department. As such he is a government official. Government officers enjoy qualified immunity when performing acts in the course and scope of their official duties. That immunity serves to insulate the officer from damage suits when: 1) reasonable grounds existed for the belief that the action was appropriate (objective belief); and 2) the officer personally held that reasonable belief and acted in good faith (subjective belief). See *Scheuer v Rhodes*, 416 US 232 (1974), *Harris v City of Roseburg*, 554 F 2d 1121 (9 Cir 1981).

The objective and subjective good faith of a defendant is an affirmative defense, but it may be dispositive in a motion for summary judgment. After the defendant raises and supports the affirmative defense, the plaintiff must meet the burden of supplying specific evidence which demonstrates the existence of a material issue of fact.

The defendant Contreras has supplied evidence which supports his argument that he acted in good faith. The parties do not dispute that Contreras responded to a call from defendant Koone, and when Contreras arrived at the scene, Koone had placed the plaintiffs under citizen's arrest for trespass. It is also undisputed that Koone informed Contreras that Koone was an agent of the federal government and that Koone told Contreras that the plaintiffs had been trespassing

on the Almaden Air Force Station property and that the plaintiffs refused to leave when asked to do so. Deputy Contreras also observed posted signs which stated that the land was federal and private property and that trespassing was prohibited. The parties further do not dispute that Contreras issued a trespass citation in response to his observations and Koone's citizen's arrest.

The plaintiffs do not contest the objective or subjective good faith of Contreras. Instead, they argue that Contreras' good faith is relevant only to the issue of the punitive damages and that liability "depends solely upon a showing that their arrest and imprisonment were in fact unlawful." *Plaintiffs' Memo in Opposition*, at 9:24-25.

The plaintiffs fail to correctly interpret the law, and they rely entirely upon their faulty interpretation. The plaintiffs' misplaced reliance led them to supply no argument or evidence which presents an issue of material fact as to either the objective good faith or the subjective good faith of Contreras. This is true even when the evidence is viewed in the light most favorable to the plaintiffs.

Accordingly, the Court finds that, under the present state of the record, no reasonable jury could find that Contreras did not act in both objective and subjective good faith. Therefore, the Court must GRANT the defendant Contreras' motion for summary judgment.

Georgia Anderson (Todd)

Defendant Anderson is a member of the Santa Clara County Sheriff's Department and serves as courtroom bailiff to Judge Murphy. Defendant Anderson took plaintiff Gaceta into custody pursuant to an order of Judge Murphy.

Defendant Anderson asserts that she performed her acts in both objective and subjective good faith. The plaintiffs again put forth no evidence or legal theory that raises a triable issue of material fact as to Anderson's good faith.

The court finds that no reasonable jury could find that Anderson did not act in good faith. As a matter of law, therefore, the Court finds that Anderson is immune from liability for her acts which are in question here. Accordingly,

the Court hereby GRANTS defendant Anderson's motion for summary judgment.

Steven Woodside

Defendant Woodside serves as assistant county counsel for Santa Clara County. He represented the county defendants in a lawsuit filed by plaintiffs in this Court (Case No. C-84-20491-WAI). The plaintiffs dismissed that suit without prejudice on 23 August 1984. Four days later, on 27 August 1984, Woodside, ignorant of the plaintiffs' dismissal, moved to dismiss the suit and filed papers in opposition to the plaintiffs "Petition For Removal". Through inadvertence, defendant Woodside did not send copies of his motion to the plaintiffs.

In their opposition, the plaintiffs present no evidence and no legal theories which directly address Woodside's motion for summary judgment. Defendant Woodside undertook no action which deprived the plaintiffs of a right, privilege or immunity secured by the Constitution or law of the United States. No reasonable jury could find otherwise. Furthermore, Wooside is immune from liability for the complained of actions which Woodside undertook in the performance of his duties for the County.

Accordingly, the Court hereby GRANTS Wooside's motion for summary judgment.

(County of Clara County

In order to predicate liability under 42 U.S.C. § 1983, the plaintiffs must allege that the defendant County has a custom, policy or practice which deprived the plaintiffs of a right, privilege or practice which deprived the plaintiffs of a right, privilege or immunity secured by the Constitution or laws of the United States *Monell v New York City Dept of Social Services*, 436 U.S. 658, 690-695 (1978). A local government entity cannot be held liable because it employs tortfeasors. In other words, county governments cannot be held liable under § 1983 on a respondeat superior theory. *Id.* at 691.

In this case, the plaintiffs complain of individual acts by certain county employees, but the plaintiffs provide no

evidence whatsoever tending to show a custom, policy or practice on behalf of the defendant County.

Accordingly, the Court hereby GRANTS the County of Santa Clara's motion for summary judgment.

Summary

Based on the above reasoning, the Court GRANTS the motions for summary judgment made by the defendants Contreras, Anderson, Woodside and the County of Santa Clara.

IT IS SO ORDERED.

DATED: July 13, 1987.

ROPERT P. AGUILAR
United States District Judge

# APPENDIX F

## California Penal Code

§142. Officer Refusing to Receive or Arrest Criminal - Sheriff's Determination of Facility Purpose and Class of Prisoners.

(a) Any peace officer who has the authority to receive or arrest a person charged with a criminal offense and willfully refuses to receive or arrest such person shallbe punished by a fine not esceeding [1] ten thousand dollars [2] ($10,000), or by imprisonment in the state prison, or in a county jail not esceeding one year, or by both such fine and imprisonment.

(b) Notwithstanding subdivision (a), the sheriff may determine whether any jail, institution, or facility under his direction shall be designated as a reception, holding, or confinement facility, or shall be used for several of such purposes, and may designate the class of prisoners for which such facility shall be used.

LegH. 1872, 1957 ch. 139, 1970 ch. 829, 1976 ch. 1139, operative July 1, 1977, 1979 ch. 169, 1983 ch. 1092, effective September 27, 1983.

§170. Maliciously Procuring Search Warrant.

Every person who maliciously and without probable cause procures a search warrant or warrant of arrest to be issued and executed, is guilty of a misdemeanor. Leg.H. 1872.

§602. Trespasses constituting misdemeanors; enumeration

Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

(a) Standing timber. Cutting down, destroying, or injuring any kind of wood or timber standing or growing upon the lands of another.

(b) Carrying away timber. Carrying away any kind of wood or timber lying on those lands.

(c) Injury to or severance from freehold. Maliciously injuring or severing from the freehold of another anything attached to it, or its produce.

(d) Soil removal. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant, any earth,

soil, or stone.

(e) Soil removal from public property. Digging, taking, or carrying away ~~from land~~ in any city or town laid down on the map or plan of the city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil, or stone.

(f) Highway signs, etc. Maliciously tearing down, damaging, mutilating, or destroying any sign, signboard, or notice placed upon, or affixed to, any property belonging to the state, or to any city, county, city and county, town or village, or upon any property of any person, by the state or by an automobile association, which sign, signboard or notice is intended to indicate or designate a road, or a highway, or is intended to direct travelers from one point to another, or relates to fires, fire control, or any other matter involving the protection of the property, or putting up, affixing, fastening, printing, or painting upon any property belonging to the state, or to any city, county, town, or village, or dedicated to the public, or upon any property of any person, without license from the owner, any notice, advertisement, or designation of, or any name for any commodity, whether for sale or otherwise, or any picture, sign, or device intended to call attention to it.

(g) Oyster lands. Entering upon any lands owned by any other person whereon oysters or other shellfish are planted or growing; or injuring, gathering, or carrying away any oysters or other shellfish planted, growing, or on any such lands, whether covered by water or not, without the license of the owner or legal occupant; or destroying or removing, or causing to be removed or destroyed, any stakes, marks, fences, or signs intended to designate the boundaries and limits of any such lands.

(h) Fences, gates and signs. Willfully opening, tearing down, or otherwise destroying any fence on the enclosed land of another, or opening any gate, bar, or fence of another and willfully leaving it open without the written permission of the owner, or maliciously tearing down, mutilating, or destroying any sign, signboard, or other notice forbidding

shooting on private property.

(i) Fires. Building fires upon any lands owned by another where signs forbidding trespass are displayed at intervals not greater than one mile along the exterior boundaries and at all roads and trails entering the lands, without first having obtained written permission from the owner of the lands or the owner's agent, or the person in lawful possession.

(j) Purpose to injure. Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

(k) Posted lands. Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering the lands without the written permission of the owner of the land, the owner's agent or of the person in lawful possession, and

(l) Refusing or failing to leave the lands immediately upon being requested by the owner of the land, the owner's agent or by the person in lawful possession to leave the lands, or

(2) Tearing down, mutilating, or destroying any sign, signboard, or notice forbidding trespass or hunting on the lands, or

(3) Removing, injuring, unlocking, or tampering with any lock on any gate on or leading into the lands, or

(4) Discharging any firearm.

(l) Occupation. Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession.

(m) Driving on private land. Driving any vehicle, as defined in Section 670 of the Vehicle Code, upon real property belonging to or lawfully occupied by another and known not to be open to the general public, without the

consent of the owner, the owner's agent, or the person in lawful possession.

(n) Refusal to leave private property. Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by

(1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or

(2) the owner, the owner's agent, or the person in lawful possession. The owner, the owner's agent, or the person in lawful possession shall make a separate request to the peace officer on each occasion when the peace officer's assistance in dealing with a trespass is requested. However, a single request for a peace officer's assistance may be made to cover a limited period of time not to exceed 30 days and identified by specific dates, during which there is a fire hazard or the owner, owner's agent or person in lawful possession is absent from the premises or property. In addition, a single request for a peace officer's assistance may be made for a period not to exceed six months when the premises or property is closed to the public and posted as being closed. However, this subdivision shall not be applicable to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act, Part 3.5 (commencing with Section 1140) of Division 2 of the Labor Code, or by the National Labor Relations Act.

(o) Closed lands. Entering upon any lands declared closed to entry as provided in Section 4256 of the Public Resources Code, if the closed areas shall have been posted with notices declaring the closure, at intervals not greater than one mile along the exterior boundaries or along roads and trails passing through the lands.

(p) Refusal to leave public building. Refusing or failing to leave a public building of a public agency during those hours

of the day or night when the building is regularly closed to the public upon being requested to do so by a regularly employed guard, watchman, or custodian of the public agency owning or maintaining the building or property, if the surrounding circumstances are such as to indicate to a reasonable man that the person has no apparent lawful business to pursue.

(q) Skiing in closed area. Knowingly skiing in an area or on a ski trail which is closed to the public and which has signs posted indicating the closure.

(r) Hotels or motels. Refusing or failing to leave a hotel or motel, where he or she has obtained accommodations and has refused to pay for those accommodations, upon request of the proprietor or manager, and the occupancy is exempt, pursuant to subdivision (b) of Section 1940 of the Civil Code, from Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code.

(s) Entry on private property by person convicted of violent felony. Entering upon private property, including contiguous land, real property, or structures thereon belonging to the same owner, whether or not generally open to the public, after having been informed by a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, that the property is not open to the particular person; or refusing or failing to leave the property upon being asked to leave the property in the manner provided in this subdivision. This subdivision shall apply only to a person who has been convicted of a violent felony, as specified in subdivision (c) of Section 667.5, committed upon the particular private property. A single notification or request to the person as set forth above shall be valid and enforceable under this subdivision unless and until rescinded by the owner, the owner's agent, or the person in lawful possession of the property.

Leg.H. 1872, 1874 p. 434, 1877 p. 118, 1905 p. 686, 1917 p.

319, 1927 p.1339, 1929 p. 1179, 1931 ch. 693, 1941 ch. 578, 1945 ch. 403, 1947 ch.647, 1949 ch. 1333, 1957 ch. 2013, 1963 ch. 1299, 1967 ch. 1187, 1969 ch. 43, 1970 chs. 1607, 1608, 1977 ch. 870 (1, 1978 ch. 1392, 1981 ch.349, 1982 ch. 312, effective June 28, 1982, 1983 ch. 199.(602. 1983 Deletes. 1. such 2. thereto 3. the 4. thereof 5. thereof 6. such 7. or roads 8. or highways 9. thereto 10. being 11.thereof 12.such 13. such 14. his 15. thereof 16. such 17. his 18. such 19.such 20.his 21. such 22. such 23. his 24. such 25. such 26. such 27. his 28.thereof 29. his 30. thereof 31. and 32. his 33. thereof 34. his 35.thereof; provided, however, that clause (2) of 36.; provided, such 37.such 38. such 39. such 40. such Ref.: Cal Fms Pl & Pr, "Assemblies and Meetings."; W. Cal. Sum., "Torts" (350.

§740. Public Offenses Prosecuted by Written Complaint.

Except as otherwise provided by law, all public offenses triable in the inferior courts must be prosecuted by written complaint under oath subscribed by the complainant. Such complaint may be verified on information and belief. Leg.H. 1951 ch. 1674. Ref.: Cal Fms Pl & Pr, "Criminal Procedure(Pts I, VIII). §834. Who May Make and Acts Constituting. An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace-officer or by a private person. Leg.H. 1872.

§807. Magistrate Defined.

A magistrate is an officer having the power to issue a warrant for the arrest of a person charged with a public offense.

LegH. 1872.

§836. Arrest Under Warrant - Peace Officer.

A peace officer may make an arrest in obedience to a warrant, or may, pursuant to the authority granted him by the provisions of Chapter 4.5 (Commencing with Section 830) of Title 3 of Part 2, without a warrant, arrest a person:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony,

although not in his presence.

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

§837. Private persons; authority to arrest Arrests by Private Persons.

A private person may arrest another:

1. For a public offense committed or attempted in his presence.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. Leg.H. 1872.

California Penal Code §838. Magistrate; oral order to officer or private person to arrest Magistrates May Order Arrest. A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

§847. Arrest by private person; duty to take prisoner before magistrate or deliver him to peace officer; liability for false arrest.

A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer. There shall be no civil liability on the part of and no cause of action shall arise against any peace officer, acting within the scope of his authority, for false arrest or false imprisonment arising out of any arrest when:

(a) Such arrest was lawful or when such peach officer, at the time of such arrest had reasonable cause to believe such arrest was lawful; or

(b) When such arrest was made pursuant to a charge made, upon reasonable cause, of the commission of a felony by the person to be arrested; or

(c) When such arrest was made pursuant to the requirements of Penal Code Sections 142, 838 or

# APPENDIX F

839.(Enacted 1872. Amended by Stats. 1957, c. 2147, p. 3806 ¤5)

§849. Duty of Officer to Take Accused Before magistrate - Release From Custody.

(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise release, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested.

(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

(3) The person was arrested only for being under the influence of a narcotic, drug, or restricted dangerous drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable.

(c) Any record of arrest of a person released pursuant to paragraphs (1) and (3) of subdivision (b) shall include a record of release. Thereafter, such arrest shall not be deemed an arrest, but a detention only.

Leg.H 1872, w935 ch. 817, 1957 ch. 2147, 1969 ch. 1259, 1970 ch. 1603, 1971 ch. 438.

§853.6 Notice to appear; contents; bail; warrant; reason for nonrelease

(a) In any case in which a person is arrested for an offense declared to be a misdemeanor, including violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released according to the procedures set forth by this chapter. If this person is released, the officer or superior shall prepare in duplicate a written notice to appear

in court, containing the name and address of the person, the offense charged, and the time and place where and when the person shall appear in court. If, pursuant to subdivision (i), the person is not released prior to being booked and the officer in charge of the booking or his or her superior determines that the person should be released, the officer or superior shall prepare a written notice to appear in a court.

(b) Unless waived by the person, the time specified in the notice to appear must be at least 10 days after arrest if the duplicate notice is to be filed by the officer with the magistrate.

(c) The place specified in the notice shall be the court of the magistrate before whom the person would be taken if the requirement of taking an arrested person before a magistrate were complied with, or shall be an officer authorized by that court to receive a deposit of bail.

(d) The officer shall deliver one copy of the notice to appear to the arrested person, and the arrested person, in order to secure release, shall give his or her written promise so to appear in court by signing the duplicate notice which shall be retained by the officer. Thereupon the arresting officer shall immediately release the person arrested from custody.

(e) The officer shall, as soon as practicable, file the duplicate notice, as follows:

(1) It shall be filed with the magistrate if the offense charged is an infraction.

(2) It shall be filed with the magistrate if the prosecuting attorney has previously directed the officer to do so.

(3) The duplicate notice and underlying police reports in support of the charge or charges shall be filed with the prosecuting attorney in cases other than those specified in paragraphs (1) and (2). If the duplicate notice is filed with the prosecuting attorney, he or she, within his or her discretion, may initiate prosecution by filing the notice or a formal complaint with the magistrate specified therein within 25 days from the time of arrest. If the prosecution is not to be initiated, the prosecutor shall send notice to the

person arrested at the address on the notice to appear. The failure by the prosecutor to file the notice or formal complaint within 25 days of the time of the arrest shall not bar further prosecution of the misdemeanor charged in the notice to appear; however, any further prosecution shall be preceded by a new and separate citation or an arrest warrant. Upon the filing of the notice with the magistrate by the officer, or the filing of the notice or formal complaint by the prosecutor, the magistrate may fix the amount of bail which in his or her judgment, in accordance with the provisions of Section 1275, will be reasonable and sufficient for the appearance of the defendant and shall endorse upon the notice a statement signed by him or her in the form set forth in Section 815a. The defendant may, prior to the date upon which he or she promised to appear in court, deposit with the magistrate the amount of bail thus set. Thereafter, at the time when the case is called for arraignment before the magistrate, if the defendant shall not appear, either in person or by counsel, the magistrate may declare the bail forfeited, and may in his or her discretion order that no further proceedings shall be had in such case, unless the defendant has been charged with violation of Section 374b or 374e of this code or of Section 11357, 11360, or 13002 of the Health and Safety Code, or a violation punishable under Section 5008.7 of the Public Resources Code, and he or she has previously been convicted of a violation of that section or a violation which is punishable under that section, except in cases where the magistrate finds that undue hardship will be imposed upon the defendant by requiring him or her to appear, the magistrate may declare the bail forfeited and order that no further proceedings shall be had in such case. Upon the making of such order that no further proceedings be had, all sums deposited as bail shall forthwith be paid into the county treasury for distribution pursuant to Section 1463.

(f) No warrant shall issue on such charge for the arrest of a person who has given such a written promise to appear in court, unless and until he or she has violated that promise or has failed to deposit bail, to appear for arraignment, trial or

judgment, or to comply with the terms and provisions of the judgment, as required by law.

(g) The officer may either book the arrested person, as defined in subdivision 21 of Section 7, prior to release or indicate on the citation that the arrested person shall be booked. In the event it is indicated on the citation that the arrested person is to be booked, the magistrate shall, before the proceedings are finally concluded, order the defendant to be booked by the arresting agency.

(h) A peace officer shall use the written notice to appear procedure set forth in this section for any misdemeanor offense in which the officer has arrested a person without a warrant pursuant to Section 836 or in which he or she has taken custody of a person pursuant to Section 847.

(i) Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter unless one of the following is a reason for nonrelease, in which case the arresting officer may release the person, or the arresting officer shall indicate, on a form to be established by his or her employing law enforcement agency, which of the following was a reason for the nonrelease.

(1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.

(2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.

(3) The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.

(4) There were one or more outstanding arrest warrants for the person.

(5) The person could not provide satisfactory evidence of personal identification.

(6) The prosecution of the offense or offenses for which the person was arrested or the prosecution of any other offense or offenses would be jeopardized by immediate release of the person arrested.

(7) There was a reasonable likelihood that the of fence or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

(9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated. The form shall be filed with the arresting agency as soon as practicable and shall be made available to any party having custody of the arrested person, subsequent to the arresting officer, and to any person authorized by law to release him or her to custody before trail.

§853.9 Copy of written notice to appear as complaint; procedure:

(a) Whenever written notice to appear has been prepared, delivered, and filed by an officer or the prosecuting attorney with the court pursuant to the provisions of Section 853.6 of this code, an exact and legible duplicate copy of the notice when filed with the magistrate, in lieu of a verified complaint, shall constitute a complaint to which the defendant may plead "guilty" or "nolo contendere." If, however, the defendant violates his or her promise to appear in court, or does not deposit lawful bail, or pleads other than "guilty" or "nolo contendere" to the offense charged, a complaint shall be filed which shall conform to the provisions of this code and which shall be deemed to be an original complaint; and thereafter proceedings shall be had as provided by law, except that a defendant may, by an agreement in writing, subscribed by him or her and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon a written notice to appear.

(b) Not withstanding the provisions of subdivision (a) of this section, whenever the written notice to appear has been prepared on a form approved by the Judicial Council, an

exact and legible duplicate copy of the notice when filed with the magistrate shall constitute a complaint to which the defendant may enter a plea and, if the notice to appear is verified, upon which a warrant may be issued. If the notice to appear is verified, the defendant may, at the time of arraignment, request that a verified complaint be filed.

§949. First Pleading.

The first pleading on the part of the people in the superior court is the indictment, information, accusation or the complaint in any case certified to the superior court under the provisions of Section 859a or the complaint filed in accordance with the provisions of Section 702 of the Welfare and Institutions Code. The first pleading on the part of the people in all inferior courts is the complaint except as otherwise provided by law. Leg.H. 1872, 1880 p. 12, 1951 ca. 1674.

§950. Formal Parts of Accusatory Pleading.

The accusatory pleading must contain:

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties:

2. A statement of the public offense of the offenses charged therein. LegH. 1872, 1880 p. 12, 1951 ch. 1674.

§952. Charging Offense.

In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. Leg.H. 1872, 1927 p. 1043, 1929 ch. 159.

# APPENDIX F

§959. Allegations Deemed Sufficient.

The accusatory pleading is sufficient if it can be understood therefrom:

1. That is it filed in a court having authority to receive it, though the name of the court be not stated.

2. If an indictment, that it was found by a grand jury of the county in which the court was held, or if an information, that is was subscribed and presented to the court by the district attorney of the county in which the court was held.

3. If a complaint, that it is made and subscribed by some natural person and sworn to before some officer entitled to administer oaths.

4. That the defendant is named, or, if his name is unknown, that he is described by a fictitious name, with a statement that his true name is to the grand jury, district attorney, or complainant, as the case may be, unknown.

5. The the offense charged therein is triable in the court in which it is filed, except in the case of a complaint filed with a magistrate for the purposes of a preliminary examination.

6. That the offense was committed at some time prior to the filing of the accusatory pleading. Leg.H. 1872, 1880 p. 13, 1927 ch. 610, 1935 ch. 198, 1951 ch. 1674.

§960. Formal Defects Harmless.

No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits. Leg.H. 1872, 1880 p. 14, 1927 ch. 632, 1951 ch. 1674.

§988. Who May arraign and Form of Arraignment.

The arraignment must be made by the court, or by the clerk, or prosecuting attorney under its direction, and consists in reading the accusatory pleading to the defendant and delivering to him a true copy thereof, and of the endorsements thereon, if any, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the accusatory pleading; provided that where the accusatory

pleading is a complaint charging a misdemeanor triable in an inferior court, a copy of the same need not be delivered to any defendant unless requested by him.

LegH. 1872, 1880 p. 16, 1909 p. 1127, 1911 p. 435, 1951 ch. 1674.

§991. Probable cause determination; misdemeanor to which defendant has pleaded not guilty; motion by defendant; setting for trial or dismissal and discharge; refiling complaint.

(a) If the defendant is in custody at the time he appears before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof.

(b) The determination of probable cause shall be made immediately unless the court grants a continuance for good cause not to exceed three court days.

(c) The determining the existence of probable cause, the magistrate shall consider any warrant of arrest with supporting affidavits, and the sworn complaint together with any documents or reports incorporated by reference thereto, which, if based on information and belief, state the basis for such information, or any other documents of similar reliability.

(d) If, after examining these documents, the court determines that there exists probable cause to believe that the defendant has committed the offense charged in the complaint, it shall set the matter for trial. If the court determines that no such probable cause exists, it shall dismiss the complaint and discharge the defendant.

(e) Within 15 days of the dismissal of a complaint pursuant to this section the prosecution may refile the complaint. A second dismissal pursuant to this section is a bar to any other prosecution for the same offense.

# APPENDIX F

§1002. Defendant Limited to Demurrer or Plea.

The only pleading on the part of the defendant is either a demurrer or a plea. Leg.H. 1872

§1003. Time to Plead or Demur.

Both the demurrer and plea must be put in, in open court, wither at the time of arraignment or at such other time as may be allowed to the defendant for that purpose. Leg.H. 1872.

§1004. Grounds.

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;

3. That more than one offense is charged, except as provided in Section 954;

4. That the facts stated do not constitute a public offense;

5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. Leg.H. 1872, 1880 p. 18, 1905 p. 772, 1951 ch. 1647.

§1427. Warrant; issuance; form; summons on offense by corporation; service; appearance and answer by corporation; nonappearance.

(a) When a complaint is presented to a judge of an inferior court of the commission of a public offense appearing to be triable in his court, he must, if satisfied therefrom that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, issue a warrant, for the arrest of the defendant.

(b) Such warrant of arrest and proceedings upon it shall be in conformity to the provisions of this code regarding warrants of arrest, and it may be in the following form: County of ---------- The people of the State of California, to any peace officer in this state: Complaint upon oath having been this day made before me that the offense of ---------- (designating it generally) has been committed and accusing ---------- (name of defendant) thereof you are therefore commanded forthwith to arrest the above-named defendant and bring him forthwith before the ---------- court of ---------- (stating full title of court) at ---------- (naming place). Witness my hand and the seal of said court this ---------- day of ---------- 19 --. (Signed) ---------- Judge of said court If it appears that the offense complained of has been committed by a corporation, no warrant of arrest shall issue, but the judge must issue a summons substantially in the form prescribed in Section 1391. Such summons must be served at the time and in the manner designated in Section 1392 except that if the offense complained of is a violation of the Vehicle Code or a local ordinance adapted pursuant to the Vehicle Code, such summons may be served by deposit by the clerk of the court in the United States mail of an envelope enclosing the summons, which envelope shall be addressed to a person authorized to accept service of legal process on behalf of the defendant, and which envelope shall be mailed by registered mail or certified mail with a return receipt requested. Promptly upon such mailing, the clerk of the court shall execute a certificate of such mailing and place it in the file of the court for that case. At the time stated in the summons the corporation may appear by counsel and answer the complaint; except that in the case of misdemeanors arising from operation of motor vehicles, or of infractions arising from operation of motor vehicles, a corporation may appear by its president, vice president,

secretary or managing agent for the purpose of entering a plea of guilty. If it does not appear, a plea of not guilty shall be entered, and the same proceedings had therein as in other cases. (Enacted 1872. Amended by Stats, 1905, c. 543, p. 706, & 2; Stats. 1951. c. 1674, p. 3857, & 146; Stats. 1953, c. 613, p. 1860, & 5, Stats. 1955, c. 720, p. 12 10, & 1; Stats. 1969, c. 1278, p. 2500, & 1; Stats. 1973, c. 718, p. 1296, & 3.)

U.S Codes

28 USC § 2680. Exceptions

The provisions of this chapter and section 1346/(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detection of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, & 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of

process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. e by the defendant, may also quash service of process where service was effectuated by force or fraud or where the person served was entitled to an immunity from service of process.

PUBLIC LAW 100-694 [H.R. 4612]; November 18, 1988

## FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT OF 1988

For Legislative History of Act, see p. 5945.

An act to amend title 28 United States Code, to provide for an exclusive remedy against United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

# APPENDIX F

## SEC. 2 FINDINGS AND PURPOSES.

(a) FINDINGS. - The Congress finds and declares the following: (1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured ny the tortious conduct of Federal employees.

(4) Recent udicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal Employee torts.

(7). In its opinion in Westfall v. Erwin, the Supremem Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) PURPOSE. - It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal Employees with an appropriate remedy against the United States.

SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH EMPLOYEES.

Section 2671 of title 28, United States Code, is amended in the first full paragraph by inserting after "executive departments," the following: "the judicial and legislative branches,".

SEC. 4. RETENTION OF DEFENSES.

Section 2674 if title 28, United States Code is amended by adding at the end of the section the following new paragraph: "With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitle.".

SEC. 5. EXCUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows: "(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. "(2) Paragraph (1) does not extend or apply to a civil

action against an employee of the Government - "(A) which is brought for a violation of the Constitution of the United States or "(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident of which the claim arose, any civil action or procedding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such clain in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provision of this title and all references thereto, and the Unted States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establsih scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be

an action or proceeding brought against the United States under the provisions of this title and all references threto, and the Untied States shall be subsituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 240(b) of this title if -

"(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and "(B) the claim was presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstances is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

APPENDIX F

SEC. 8. EFFECTIVE DATE.

(a) GENERAL RULE.- This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICABILITY TO PROCEEDINGS.- The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

(c) PENDING STATE PROCEEDINGS.- With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

(d) CLAIMS ACCRUING BEFORE ENACTMENT.- With respect to any civil action or proceedingg to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period which the claim shall be deemed to be timely presented under section 267(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

SEC. 9. TENNESSEE VALLEY AUTHORITY.

(a) EXCLUSIVENESS OF REMEDY.-(1) An action against the Tenessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tenessee Valley Authority while acting within the scope of this office or employment is exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising

out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a cognizable action against an employee of the Tennessee Valley Authority for money damages for a violation of the Constitution of the United States.

(b) REPRESENTATION AND REMOVAL.- (1) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding heretofore or hereafter commenced upon such claim in a United States district court shall be deemed an action against the Tennessee Valley Authority pursuant to 16 U.S.C. 831C(b) and the Tennessee Valley Authority shall be subsituted as the party defendant. (2) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the Tennessee Valley Authority under the provisions of this title and all references thereto, and the Tennessee Valley Authority shall be substituted as the party defendant. This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal. (3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action shall be deemed an action brought against the Tennessee Valley Authority, and the Tennessee Valley Authority shall be

substituted as the party defendant. A copy of the peition shall be served upon the Tennessee Valley Authority in accordance with the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court. (4) Upon certification, any actions subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the Tennessee Valley Authority and shall be subject to the limitations and exceptions applicable to those actions.

(c) RETENTION OF DEFENSES.- Section 2674 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph: "With resoect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee VAlley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.".

Approved November 18, 1988.

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LEGISLATIVE HISTORY-H.R. 4612 (S. 2500): HOUSE REPORTS: no. 100-700 (Comm. on the Judiciary). CONGRESSIONAL RECORD, Vol. 134 (1988): June 27, 28, considered and passed House. Oct. 12, considered and passed Senate, amended. Oct. 20, House concurred in Senate amendment.

# APPENDIX F

## California Code of Civil Procedures

§21. Classes of judicial remedies. Division of Judicial Remedies.

These remedies are divided into two classes:

1. Actions; and,
2. Special proceedings. (Enacted 1872.)

§22. Action defined

An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. (Enacted 1872. Amended by Stats. 1933, c. 742, p. 1805, & 2.)

§23. Special proceeding defined

Every other remedy is a special proceeding. (Enacted 1872.)

§418.10 Motion to quash service of summons or to stay or dismiss action: procedure.

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or

within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his responsive pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant. (Added by Stats. 1969, c. 1 610, p. 3363, & 3, operative July 1, 1970.)

Comment - Judicial Council

Section 418.10 continues the law that permits a defendant, or in appropriate cases a cross-defendant, who desires to challenge the jurisdiction of the court and to raise certain defenses, to make a special appearance for such purposes, without submitting to the jurisdiction of the court. (Subdivision (a).) At the same time, Section 418.10 also permits him to object on inconvenient forum grounds to the court's exercising its jurisdiction over him if his challenge to jurisdiction should be denied.

The defendant or cross-defendant, on or before the last day on which he is required to file a responsive pleading to the complaint (usually 30 days from date of completed service), or within such additional time as the court may for

good cause allow, must serve and file a notice that he will present in court, on a date not less than 10 days nor more than 20 days after filing the notice, a motion to quash the summons or other process and/or to stay or dismiss the action. (Subdivision (a) and (b)). Service and filing of this notice extends the defendant's or cross-defendant's time to plead until 15 days after service of written notice of the trial court's denial of his motion is, of course, not needed, since the service of summons is quashed or the action is stayed or dismissed.

Defendant is permitted to join with such motion a motion under Section 473 or 473.5 of the Code of Civil Procedure to set aside a default or default judgment. (Subdivision (3); 43 Cal. L.Rev. 695, 699.) Neither of these motions, when made with a motion under this section, is deemed a general appearance by the defendant.

If this motion is made and denied by the trial court, the defendant must plead to the complaint or cross-complaint within the period of extension (15 days and any additional time granted by the court up to a total of 35 days after service of written notice of the order of denial), unless he elects to petition an appropriate reviewing court for a writ of mandate to require the trial court to enter an order quashing the service of summons or staying or dismissing the action. (Subdivision (c); see Armstrong v. Superior Court (1956) 144 Cal.App.2d 420, 430, 301 P.2d 51; 43 Cal.L.Rev 695; 29 So.Cal.L.Rev. 98.) Upon serving and filing a notice in the trial court that he has petitioned for such writ of mandate, the defendant or cross-defendant is given a second extension of time to plead: until 10 days after written notice of final judgment of denial in the mandate proceeding, with a permissible added extension for good cause shown of up to a total of 30 days. (Subdivision (c).) No default may, again, be entered against the defendant until expiration of his time to plead. (Subdivision (d).)

The ground for granting a motion to quash service of process on a defendant, or in appropriate cases a cross-defendant, is that the court lacks jurisdiction over him

because either there is no basis of judicial jurisdiction existing between such defendant and this state (see Section 410.10) or no authorized method of service was properly used in an attempt to give such defendant actual notice of the action (see Section 413.10), and such defendant has not made a general appearance in the action (Section 410.50). In accordance with the former law, the court, in the absence of a general appearance by the defendant, may also quash service of process where service was effectuated by force or fraud or where the person served was entitled to an immunity from service of process. (See, e.g. comment to Section 410.10, Bases of Judicial Jurisdiction Over Individuals, (1) Presence.) The grounds and conditions for granting a motion to stay or dismiss an action for inconvenient forum reasons are discussed in the comment to Section 410.30.

# APPENDIX G

## Analysis of Penal Code Sections 740, 853.9(b), 950, 1004, and 1012.

California Penal Code Section (Hereinafter referred to as "PenC §") 740 Public Offenses Prosecuted by Written Complaint, states that a written complaint may be verified on information and belief.

PenC § 853.9(b) Filing a Complaint After Citation, states that a verified complaint is legally sufficient and upon which a warrant may issue if it is written legibly on a printed form approved by the Judicial Counsel (*People v Heldt* (1985) 163 CA3 532, 536; 209 CR 579) with no requirement for any other qualifying constitutional provisions such as those enunciated by the United States Supreme Court in Illinois v Gates (1983) 103 SCt 2317 and the California Supreme Court in *People v Sesslin*, 69 C2 418 which would enable a neutral and impartial magistrate to determine that probable cause exists for the arrest of the accused.

PenC § 853.6(f) Citations for Misdemeanors Under State Law, states that no warrant for arrest of a person shall issue from a complaint under Section 853.9(b) unless the person fails to post bail, failed to appear for arraignment, or otherwise failed to comply with the terms of the Notice To Appear / Complaint of PenC § 740.

PenC § 1012 Objections Which Must Be Taken by Demurrer, states that an objection to the jurisdiction of the court may be taken only by arrest of judgment subsequent to trial and conviction.

PenC § 1004 Grounds [for Demurrer] at Subd. 1, states that a misdemeanor complaint is demurrable for jurisdictional defects (*if and only if*) the court does not have jurisdiction over the Penal Code Section charged in the complaint.

PenC § 950 Formal Parts of Accusatory Pleading, must contain: 1) The title of the action, specifying the name of the court to which the same is presented, and the names of the parties; and 2) A statement of the public offense or offenses charged therein.

# APPENDIX G

A demurrer is a general appearance which, in the case of a misdemeanor complaint written on a NOTICE TO APPEAR / COMPLAINT, confers jurisdiction of the person of the defendant and the subject matter upon on the court. (Haverstick v Southern Pacific (1934) 1 CA 2d 605; Olcese v Justice's Court (1909) 156 C 82.)

A general appearance waives "formal" inadequacies in the complaint and effectively defeats the objective of challenging the personal jurisdiction of the court when the insufficiency of the misdemeanor complaint is not apparent on its face and goes to the subject matter. (*French v Senate* (1905) 146 C 604.)

All defects consisting merely in the absence of that particularity which might be necessary to enable the defendants to prepare for and make their defense are to be regarded as defects in form and cannot be raised by such a motion [in arrest of judgment]. (*People v Welton* (1922) 190 C 236, 240; 211 P 802.)

# APPENDIX H

## REFERENCES TO THE RECORDS

1 Doc. 62, Document 10
Municipal Court Minute Order
Motion re jurisdiction denied
Next Court Appearance Date 7/30.84

2 Doc. 62, Document 14, 16, 17
Municipal Court Minute Orders

3 Doc. 62, Document 28
General Services Administration Report of Excess Real Property, Incl 1 and 2.

4 Doc. 62, Document 28
Schedule B of Attorney's Final Title Opinion, Almaden Air Force Station, Narrative Statement of Outstanding Rights.

5 Doc. 62, Document 28
Schedule B to Attorney's Final Title Opinion, Almaden Air Force Station, Narrative Statement of Outstanding Rights. Paragraph 3 of Schedule B states a reservation by Frances C. Dieterich of joint usage of Mt. Umunhum Road for herself, heirs, successors, assigns, agents, and licensees;

6 Doc. 62, Document 29
Letter dated June 28, 1982, GSA to U.S. Army Corps of Engineers, accepting Almaden Air Force Station as surplus property.

7.1 Doc. 169, Exh. A
Declaration of John Contreras, p. 1, para. 2.

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7.2 Doc. 169, Exh. A
Declaration of John Contreras, p.3, l.5.;

7.3 Doc. 169, Exh. A
Declaration of John Contreras, p.2, l.7.;

7.4 Doc. 169, Exh. A
Declaration of John Contreras, p.5, l.5.;

7.5 Doc. 169, Exh. A
Declaration of John Contreras, p.4, l.19.

7.6 Doc. 169, Att. A
Declaration of John Contreras

8 Doc. 169, Exh. B & C
NOTICE TO APPEAR / COMPLAINT

9 Doc. 169, Exh. L
Municipal Court Minute Order dismissing for lack of jurisdiction.

10.1 Doc. 195, Att. 1
Docket Sheet, Municipal Court, Warrants: Issuance / Disposition ‹Blank›.

11 Doc. 195, Att. 1
Transcript of the Proceedings in the Municipal Court, July 23, 1984.

11.1 Doc. 195, Att. 1, page 6.
Transcript of the Proceedings in the Municipal Court, July 23, 1984

12.1 Doc. 195, Att. 1, page 6.
Transcript of the Proceedings in the Municipal Court, July 23, 1984, affidavit of James Sugiyama.

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12.2 Doc. 195, Att. 1, page 6.
Transcript of the Proceedings in the Municipal Court, July 23, 1984

13 Doc. 195, Att. 1
Transcript of the Proceedings in the Municipal Court, July 23, 1984, Title page, "For the People ‹blank›"

14 Doc. 195, Att. 1, Document 6
Declaration and Points and Authorities in Support of Lack of Jurisdiction.

15 Doc. 195, Att. 1
County Jail Bookking Form,
Arrest Location:
Municipal Court, July 23, 1984, Trespassing, PenC 602(n)(2)

16 Doc. 195, Att. 1
County Jail Booking Form, Bail: $2000

17 Doc. 195, Att. 1
Municipal Court Minute Order, Next Court Appearance Date

18 Doc. 195, Att. 1, Exh. 1
Brochure, Statement of Policy of MPROSD
to grant public access to land owned by MPROSD for recreational purposes

19 Doc. 195, Att. 1, Exh. D
Sheriff's Incident Report

19.1 Doc. 195, Att. 1, Exh. D,
Sheriff's Incident Report, p.1;

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20 Doc. 195, Att. 1, Exh. G,
Attorney's Final Title Opinion,
Almaden Air Force Station (Z-96)
Santa Clara County,
California, 4 Feb. 1981.

21 Doc. 195, Att. 1, Exh. H,
Report, MPROSD, September 22, 1983
and map of Manzanita Ridge showing
MPROSD land holding at
summit of Mt. Umunhum.

22 Doc. 195, Att. 1, Exh. M,
Copies of Grant Deeds for seven
easements from official real estate records
of Santa Clara County Recorder;

23 Doc. 195, Att. 1, Exh. N,
Map, Corps of Engineers, U.S. Army,
Real Estate, Almaden Air Force Station
(Z-96), with Tract Register showing
names of land owners.

25 Doc. 195, Att. 2,
Municipal Court Docket sheets.

26 Doc. 195, Att. 2,
Municipal Court Docket Sheet, Warrants:
Issuance / Disposition, ‹no entries›

27 Doc. 195, Att. 2,
Municipal Court Minute Order, Hearing:
Arraignment.

28 Doc. 195, Att. 2d,
Special Appearance in Challenge of
Jurisdiction, Points and Authorities in
Support of Challenge of Jurisdiction.

# APPENDIX H

29 Doc. 195, Att. 3,
Map, U.S. Army Corps of Engineers, Mt. Umunhum Tracts of Land and Easements)

30 Doc. 195, Att. 4,
Section of the Official cadestral and topographical map of Santa Clara County of 1905, showing Mt. Umunhum and part of Mt. Umunhum Road.)

31 Doc. 195, Att. 4, Exh. 6,
Grant Deed and Exhibit A, which grants from the estate of Frances C. Dieterich to MPROSD the land surrounding the eastern end of Almaden Air Force Station.

32 Doc. 195, Att. 4, Exh. 10,
Resolution and Order Declaring Election Results of, and Declaring the Formation of the Mid-peninsula Regional Park District)

33 Doc. 195, Att. 4, Exh. 11 & 12,
Declaration from William B. Robertson stating that Mt. Umunhum Road was open to the public and unobstructed from 1970 to 1982, with three photographs;

34 Declaration from Jobst Brandt stating that Mt. Umunhum Road was open to the public and unobstructed from 1957 to some time in the early 1980's.

35 Doc. 195, Att. 4, Exh. 14,
Photos 6, 7, 8, 9, 10, & 12.) His property and the park land belonging to the Mid-Peninsula Regional Open Space District share several common boundaries.

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36 Doc. 195, Att. 4, Exh. 14,
Photos 6, 7, 8, 9, 10, & 12.

37 Doc. 195, Att. 4, Exh. 14,
Photos 11.

38 Doc. 195, Att. 4, Exh. 14,
Photos 14.

39 Doc. 195, Att. 4, Exh. 15,
Job Description, Duties and
Responsibilities of Dwayne Koone.

# APPENDIX H

DONALD L. CLARK, County Counsel
JAMES RUMBLE, Deputy County Counsel
County Government Center, East Wing
70 W. Hedding Street, 9th Floor
San Jose, California 95110
Telephone: (408) 299-2111
Attorneys for Defendants

Portions of the Record Docket 169a

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| MERCEDES L. GACETA AND NORMAN R. VUNCK,<br>Plaintiffs,<br>VS.<br>COUNTY OF SANTA CLARA, et al.,<br>Defendants. | No. C 85 20386 RPA<br>DECLARATION OF JOHN CONTRERAS<br>DATE: July 10, 1987<br>Time: 9;00 a.m. Dept: 1<br>Judge: Robert P. Aguilar |

I, JOHN CONTRERAS, declare:

1. I am a deputy sheriff with the Santa Clara County Sheriff's Department. I have been employed as a deputy sheriff by Santa Clara County since 1978.

2. On June 24, 1984, at approximately 5:10 p.m. I was advised by radio to respond to the Almaden Air Force Station at No. 1 Mt. Umunhum Road, on report of two subjects being taken into custody for trespassing. On that day I was assigned to the Sheriff's Department's Patrol Division. It took me approximately 30-40 minutes to respond as I was in the vicinity of West San Carlos Street and Bascom Avenue in San Jose at the time I received the call.

3. After entering Mt. Umunhum Road, I passed an area which had signs clearly marked and visible which stated "Do

not Enter", "Private Road", and "No Trespassing".

4. After traveling approximately two more miles, I arrived at a gate located on Mt. Umunhum Road. I had never before been to that gate on Mt. Umunhum Road. There were four individuals in the vicinity of the gate. Upon arrival, I spoke to Dwayne Koone who informed me that he was a security officer for the Almaden Air Force Station located at Mr. Umunhum. Koone informed me that he had requested that the Sheriff's Office be called to take two individuals into custody who he had detained for trespassing.

5. Mr. Koone informed me that the gate was the dividing line between the property owned by private individuals and the land which was part of the Almaden Air Force Station. Mr. Koone told me that the property on the side of the gate leading to the gate from Hicks Road (southern side) was owned by private individuals and that the property on the other side of the gate (northern side) was part of the Almaden Air Force Station.

6. In addition, Mr. Koone told me the following:

a. Koone and John Woody were checking the gate when two persons (plaintiffs) on a motorcycle pulled up to the gate.

b. Koone asked plaintiffs if they needed help; plaintiffs said no.

c. Koone advised plaintiffs they were on private property and trespassing.

d. Koone asked plaintiffs if they had seen the "no trespassing" sign and plaintiffs indicated that they had.

e. Koone advised plaintiffs two times more that they were trespassing and must leave.

f. Plaintiffs ignored Koone's request; he advised them that he was going to call the Sheriff's Office.

g. Koone and John Woody call the Sheriff's Office.

h. In the meantime, Koone said that plaintiffs had walked approximately 150 feet back to the gate on to the air force station property. Plaintiffs then asked Koone if they were under arrest.

i. Koone advised plaintiffs that they were under citizen's arrest for trespassing. After having been advised that they were under citizen's arrest, plaintiffs turned around and walked back onto Air Force Station property and disappeared from sight. Koone said that just prior to my arrival plaintiffs had returned from their "walk".

7. Finally, Mr. Koone demanded that I take plaintiffs into custody since he had performed citizen's arrest for trespassing.

8. After speaking to Mr. Koone I talked with plaintiffs who identified themselves as Norman Vunck and Mercedes Gaceta.

9. I asked plaintiffs if they had seen the "No Trespassing" and "Private Road Do Not Enter" signs. Both plaintiffs stated they had seen the signs.

10. I asked plaintiffs if they had refused to leave the property when asked to do so by defendant Koone. Plaintiffs stated they had refused to leave.

11. As a result of the information I had received, I believed that I was obligated to follow through on Mr. Koone's citizen's arrest by either issuing a citation or taking Mr. Vunck and Mr. Gaceta into custody for trespassing. Mr. Koone had informed me that he was a security officer at the Almaden Air Force Station, that he had observed Mr. Vunck and Ms. Gaceta trespass on the base property, and that Mr. Vunck and Ms. Gaceta had refused to leave the property when requested to do so by Mr. Koone. Furthermore, Mr. Vunck and Ms. GAceta had told me that they had refused to leave when asked to do so by Mr. Koone. In addition, there was a sign on the gate which stated that the property was owned by the United States Government.

12. Also, prior to the incident, Lieutenant Ronald McLeister, Assistant Patrol Commander, had advised me that the County had an agreement with the United States Air Force that the Sheriff's Office would enforce criminal complaints which occurred on United States Air Force property, including the Almaden Air Force Station.

13. If I had failed to either cite or detain plaintiffs, I believed that I would have been violating California Penal Code Section 142 since I had no reason to believe that Mr. Koone had performed illegal citizen's arrests.

14. I issued a citation for trespass to plaintiffs to follow through on Mr. Koone's citizen's arrest. I had no authority to arrest plaintiffs on my own since I could only arrest an individual for a misdemeanor like trespass if the violation was committed in my presence.

15. I had no desire to take plaintiffs into custody so I advised both plaintiffs Vunck and Gaceta that I would be giving them each a citation for trespassing.

16. I asked plaintiffs to sign on the bottom of the citation which would be their promise to appear in court on the date and time shown on the citation.

17. Plaintiffs refused to sign the citation.

18. I advised the plaintiffs that if they did not sign the citation, I would have to take them into custody.

19. Plaintiffs signed the citation with the notation that it was signed under duress. Copies of the citations issued to plaintiffs are attached to this declaration.

20. After getting their signatures, I advised Plaintiffs Vunck and Gaceta that they were free to leave.

21. Later that day, I prepared an Incident Report regarding this matter. A copy of that Incident Report is attached to the Declaration.

22. Based upon the foregoing, I believe that I acted in accordance with the laws of the state in good faith and without any intent to deprive plaintiffs of any of their rights, immunities or privileges which are constitutionally guaranteed to them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6-10, 1987, at San Jose, California.

/s/

---

John Contreras
JR/hh/3738g-9

APPENDIX H

Norman R. Vunck
744 Millstream Drive
San Jose, CA 95125
Telephone (408)723-7627
In Propria Persona

Portions of the Record Docket 195a1

THE MUNICIPAL COURT OF CALIFORNIA
SANTA CLARA COUNTY
LOS GATOS --CAMPBELL JUDICIAL DISTRICT

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br>ACCUSERS,<br>vs.<br>NORMAN R. VUNCK,<br>ACCUSED. | No. 84-8364A<br>DECLARATIONS AND POINTS AND AUTHORITIES IN SUPPORT OF LACK OF JURISDICTION |

COMES NOW THE ACCUSED specially and not generally herein and cites both fact and law to indicate that the Court lacks jurisdiction in this matter.

The Court lacks jurisdiction in this action for the following reasons:

1. No crime as a matter of law has been committed by the ACCUSED. The ACCUSED was falsely imprisoned and falsely arrested for allegedly trespassing on private property. In fact, the ACCUSED was on a right of way, on a street connecting a County road with public lands from which the public is not excluded. Furthermore this road is the right of way to provide access to at least thirty-five (35) properties over which the right of way traverses and provides access to literally hundreds of other properties in the area.

The name of the street which is the right of way is believed to be Alta Loma Road which connects Hicks Road to many tracts of land shown in Book 562 in the Santa Clara County Assessor's Office. Among the properties listed in

Book 562 over which the right of way traverses is 562-08-04 which is a large parcel belonging to the Mid-Peninsula Open Space District, a political District of the State of California. This area is open generally and specifically for equestrian. In addition, at the end of the road is a tract of forty-three (43) acres of surplus Federal public road under the custodial jurisdiction of the General Services Administration of the U.S. government, which was formerly the Alameda Air Station of the US Air Force. Negotiations for the purchase of this property by the Mid-Peninsula Open Space District from the Federal government are now in progress. In addition, there are two other properties belonging to the State of California which gain access via this right of way.

> "111. RIGHT INVADED AND RIGHT OF ACTION FOR INVASION §17. In General Trespass will not lie for the disturbance of an incorporated hereditament. While the invasion or disturbance of rights of a person in and to property either real, as discussed infra §§21-29, or personal, infra §§18-20, may constitute a cause of action for trespass, *trespass will not lie* for the disturbance of an incorporated hereditament, such as a grant of the use of timber, *a right of way, or a street.* "(Emphasis added.) (Corpus Juris Secundum, Trespass §§16-17) *N.Y.-Socony-Vacuum Oil Co. v. Daily,* 109 N.Y.S.2d 799; S.C.-*Clark v. Ray,* 45 S.C.L. 621, 625.)

2. The requirements for arrest pursuant to PC 602(n) were not complied with.

The accused traveled from Hicks Road up the right of way believed to be Alto Loma Road, and came to a barrier across the road. A truck was parked on the other side of the barrier on the Federal property, in which were two unidentified men. These men ordered the accused to leave the right of way immediately. When the accused did not immediately leave, one of the men got out of the truck, unlocked and opened the gate across the road. This man then got back into the truck, drove through the gate leaving the Federal property onto the right of way and blocked the

accused from leaving. This man then stated that in the event that the accused attempted to leave, he would block his attempt and if necessary, drive him off the road. The second man left the site to summons a sheriff.

After approximately two hours, the sheriff arrived. The driver of the truck then instructed the sheriff to cite the accused for trespassing under PC 602 of any applicable sub-heading. After some reading and consultation with the accusers, the sheriff wrote a citation for failure to leave private property after being requested to do so, to wit:

> "§602. Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:
>
> n) Refusing or failing to to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer and the owner, his agent or the person in lawful possession thereof, or (2) the owner, his agent or the person in lawful possession thereof provided, however, that the clause (2) of this subdivision shall not be applicable to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the California Agriculture Labor Relations Act, Part 3.5 (commencing with Section 1140) of Division 2 of the Labor Code, or by the National Labor Relations Act."

At no time did the sheriff ask the accused to leave the right of way nor was the accused allowed to leave until after the sheriff wrote the citation for trespassing.

> §7. Penal Code §602 subd. (n) which defines one variety of trespass as a refusal to leave private property upon request, required two separate requests to leave premises, one from a peace officer and another from the property owner." (*People v. Medrano* (1978) 78 CA3d 198.)

3. The right of way from which the public is not specifically excluded was not then and is not now nor can it

ever be private property of; nor private property in the lawful possession of either of the two unknown men who made the complaint of trespassing against the accused. Nor can they eject either the public or the accused from the right of way as agents for the combined owners of the right of way unless certain conditions have been met.

In order for this Court to have jurisdiction over the accused, the Court must be convinced that a crime has in fact been committed. In order for a crime to have been committed, the agency of the two men who made the complaint must extend to each and every one of the owners who control the right of way, two of which are the Mid-Peninsula Open Space District and the State of California.

In addition, each of the owners must have recorded with the Santa Clara County recorder a statement to the effect that access to the right of way is restricted to allow passage of either specific persons or specific classes of persons in accordance with Civil Code §§1008 and 1009. Without having performed the exhaustive research necessary to confirm the existence of these exclusionary affidavits, it can be safely assumed that neither the Mid-Peninsula Open Land district nor the State of California have done so.

However, if the Court is to claim jurisdiction in this case, the Court must be absolutely certain that these conditions have been met.

In order for those two accusers to be the agents to speak for the owners and multiples of consortiums of owners of the properties over which the right of way traverses and to be able to speak as agents for the other property owners who gain access to their property via the right of way, the accusers would have to have an agency agreement from each and every property owner including the State of California and the Mid-Peninsula Open Space District.

In order for the Court to have jurisdiction over the accused, in addition to each owner having conferred upon those two men who made the accusation of trespass on a right of way an agency agreement, each owner would have to post a sign every 200 feet in accordance with Civil Code

1008.

"Civil Code §1008. Title by prescription; permissive use.

No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: "Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code" ".

Not a single sign in conformance with Civil Code 1008 is in evidence anywhere along that right of way.

DATED July 23, 1984

Respectfully Submitted

/s/

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Norman R. Vunck

# APPENDIX H

## Portions of the Record Docket 195a4

(The document below is a typewritten copy of the job description of Alan Dwayne Koone as submitted in APPELLEE DWAYNE KOONE'S RESPONSE BRIEF; the submitted form is illegible in some portions and all attempts are made to copy all those portions that are readable.)

Box title: 3. ORGANIZATION Typed entry is:
Travis AFB, California
60 Air Base Group
60 Civil Engineering Squadron
Real Estate Branch Almaden Caretaker Force

Box title: 2. POSITION NO. Typed entry is: 0-06404-(illegible type)

Box title: 4. POSITION TITLE Typed entry is: Maintenance Worker

Box title: 5. CLASSIFICATION Typed entry is: WC-4749-07

Box title: 6. CLASSIFIED BY Typed entry is: Wm R Reichert (a signature appears above the typed entry)

Box title: DUTIES AND RESPONSIBILITIES Typed entry is:

I. INTRODUCTION: Functional statement is attached to the organizational chart. (off-page word) purpose of the position is to provide maintenance mechanic expertise necessary to (off-page word) pickled Air force facilities in an acceptable condition for immediate reopening or disposal to another agency.

II. DUTIES AND RESPONSIBILITIES:

1. Working from drawings or from personal knowledge, accomplishes the following:

a. Repairs buildings: Repairs buildings and other facilities which have deteriorated as a result of vandalism, weathering or wear and teas from continued (off-page word) Items used may include lumber, drywall paneling, window glass, putty, etc. Tools include hammers, saws, drills, squares, planes, and miscellaneous carpenters tools.

b. Repairs piping, plumbing systems; Repairs hot and

cold water distribution systems, sewer lines, plumbing fixtures, etc. Uses all tools common to the plumbing trade.

c. Repairs low voltage (less than 120 volts) circuits. Replaces switches duplex outlets. lighting fixtures, etc. Identifies electrical problem areas.

d. Paints facilities or portion thereof which have been repaired or which have suffered weathering, prepares work prior to painting to insure maximum life of pai(off-page word).

e. Serves as security guard at site by reporting to supervisor and county she(off-page word) any trespasses upon property.

f. Performs work necessary to maintain streets and grounds in a usable conditi(off-page word).

g. Performs other minor tasks as may be directed by supervisor.

III. CONTROLS OVER WORK: Works under the direct supervision of the site caretaker foreman. Performs work independently and may identify and accomplish needed work not spelled out by supervisor.

(At the bottom of the sheet is an area filled with boxes and handwritten entries . At the bottom left-side is what appears to be a form identification which looks like "FORM 1378".)

(2nd page)

IV. OTHER SIGNIFICANT FACTS: Required to walk over site terrain which is genera(off-page word) rough and requires some additional physical effort. May bend, stoop, climb ladde(off-page word) and work in cramped areas. Work is performed both outdoors and indoors in varyin(off-page word) conditions from adverse to pleasant. Position is FLSA non-exempt.

(A stamped mark appears at the left side of the page. It reads "TRAVIS AFB GOVERNMENT COPIER NUMBER 108".)

# APPENDIX H

Portions of the Record Docket 195d1

## SANTA CLARA COUNTY SHERIFF - 4300 INCIDENT REPORT

Left-most corner, 1st line: 885 N. San Pedro Street Left-most corner, 2nd line: San Jose, Calif 95110 Left-most corner, 3rd line: (408) 294-1334

The rest of information on form is written in as follows: First box on left: PC 602 (n) (2)

Box title: REPORT/BEAT NO Written entry is: Q33 IR 84-8363-A

Box title: TYPE OF INCIDENT Written entry is: Trespassing after being told to leave

Box title: LOCATION OR OCCURRENCE Written entry is: No.1 Mt. Umunhum

Box title: CROSS STREET Written entry is: Hicks

Box title: NAME OF VICTIM Written entry is: U.S. Government

Box title: DOB No written entry

Box title: SSN No written entry

Box title: ASSAULT VICTIM HT/WT No written entry

Box title: RESIDENCE ADDRESS No written entry

Box title: RES PHONE No written entry

Box title: BUSINESS NAME Written entry is: Almaden Air Force Station No. #1 Mt. Umunhum

Box title: BUS PHONE Written entry is: 997-1297

Box title: REPORTED BY Written entry is: Security Officer Dwayne Alan Koone

Box title: DOB No written entry

Box title: SSN No written entry

Box title: RES PHONE Written entry is: 997-6425

Box title: RESIDENCE ADDRESS Written entry is: U.S. Government Almaden Air Force Station No.#1 Mt. Umunhum

Box title: DAY/DATE/TIME OCCURRED Written entry is: Sun/06-24-84/1710 hrs

APPENDIX H

Box title: REPORTED TO Written entry is: S/O

Box title: DATE/TIME REPORTED Written entry is: 06-24-84- 1715 HRS

Box title: ASSOC IR NO & AGENCY No written entry

Box title: SUSPECT/ARRESTEE #1 Written entry is: NORMAN RICHARD VUNK

Box title: DOB Written entry is: 7-20-85

Box title: SSN No written entry

Box title: D/L NO Written entry is: CA M0299635

Box title: BOOKED (box) CITED (cancelled box) Written entry is: M-120814

Box title: ADDRESS USED Written entry is: P.O. BOX 32008 S.J.

Box title: SEX/RACE Written entry is: M/W

Box title: HT/WT Written entry is: 507/185

Box title: HAIR/EYES Written entry is: BRN/GRN

Box title: MARKS/SCARS/TATTOOS Written entry is: NONE NOTED

Box title: LIST BELOW PARTICIPATING LAW ENFORCEMENT OFFICERS, ATTACHMENTS, ADDITIONAL VICTIMS, SUSPECTS, AND WITNESSES, DETAILS OF CRIME (INCLUDING IDENTIFYING MARKS), DESCRIPTION AND VALUES OF PROPERTY:

(Written entries in the succeeding 20 lines are:) DEP. J. CONTRERAS #260 O.R. VEH. INVOLVED - 1981 HONDA MOTORCYCLE GL1100 LIC# 5U5767 ARST #2 MERCEDES L. GACETA DOB 8-30-42 ADD: 744 MILLSTREAM DR. S.J. 95125 FEMALE-ORIENTAL 409/90LBS - NO D.L. - NO SSN - CITATION #M-170815 W#1 JOHN EDWARD WOODY P.O.BOX 20412 S.J. 95160 - HOME PHN 997-1168 AT APPROX. 1715 HRS. I RESPONDED TO THE ALMADEN AIR FORCE STATION ON REPORT OF TRESPASSERS. UPON MY ARRIVAL I SPOKE WITH THE R/P KOONE WHO STATED HE HAD TWO SUBJ HE WANTED CITED. WHEN I ASKED HIM WHAT HAPPENED HE RELAYED THE FOLLOWING. (end of first page)

(2nd page) Printing on 2nd page at left side: PAGE 2 Box

title: REPORT/BEAT NO. Written entry is: Q-33 84-8364-A Written at top right: PG 1 OF 2 (Written entries in the succeeding 36 lines are:)

R/P STATEMENT KOONE STATED HE IS THE SECURITY OFFICER FOR THE ALMADEN AIR FORCE STATION AND WAS ON DUTY WITH W#1, CHECKING THE GATE ON THE MT. UMUNHUM ROAD SIDE.

WHILE AT THE GATE HE STATED TWO SUBJ'S (A#1 & A#2) ON A MOTORCYCLE PULLED UP TO THE GATE AND STOPPED. WHEN KOONE ASKED THEM IF THEY NEEDED ANY HELP THEY STATED NO WE DON'T NEED ANY HELP. KOONE EXPLAINED THEY WERE ON PRIVATE PROPERTY AND TRESPASSING. KOONE WENT ON TO ASK THEM IF THEY SAW THE SIGNS AT THE BASE OF THE ROAD STATING NO TRESPASSING, AND PRIVATE ROAD DO NOT ENTER. BOTH REPLIED THEY HAD SEEN THE SIGNS AND WANTED TO KNOW WHOSE PROPERTY THEY WERE ON. KOONE STATED THE ROAD IS MAINTAINED BY THE GOVERNMENT AND CONTROLLED BY THE PRIVATE CITIZENS WHOSE PROPERTY THE ROAD RUNS THROUGH.

KOONE STATED HE TOLD THEM TWO MORE TIMES THEY WERE TRESPASSING AND SHOULD LEAVE. A#1 STATED HE WAS NOT LEAVING AND THAT HE WAS GOING TO LOOK AROUND. KOONE STATED HE TOLD THEM IF THEY DID NOT LEAVE HE WOULD HAVE TO CALL THE S/O. A#1 SAID GO AHEAD AND GET ONE UP HERE.

KOONE OPENED THE GATE AND WAS GOING TO DRIVE HIS VEH. TO A NEIGHBORS HOUSE IN ORDER TO CALL THE S/O.

KOONE DECIDED TO RETURN TO THE GATE AND HAD W#1 CALL. KOONE STATED THE SUBJ'S HAD ENTERED THE GATE AND HAD WALKED APPROX. 150' ONTO THE AIR FORCE STATION PROPERTY. AS KOONE WATCHED BOTH SUBJ'S RETURNED AND ASKED HIM IF THEY WERE UNDER ARREST. WHEN

KOONE TOLD THEM THEY WERE UNDER CITIZENS ARREST BOTH SUBJ'S TURNED AROUND AND WITHOUT SAYING A WORD WALKED BACK INTO THE AIR FORCE PROPERTY. KOONE STATED THEY WALKED UP A DIRT TRAIL AND DISAPPEARED FROM SIGHT. (end of second page)

(3rd page) Headings: SANTA CLARA COUNTY SHERIFF - 4300 SUPPLEMENTARY REPORT PAGE 2 of 2, OFFICERS NAME J. CONTRERAS BADGE # 260 DATE SUBMITTED 06-24-84

Box title: REPORT/BEAT NO Written entry is: 84-8364-A

(Written entries in succeeding 35 lines are:) KOONE STATED THE SUBJ'S RETURNED JUST BEFORE I ARRIVED.

I SPOKE WITH BOTH SUBJ'S AND ASKED THEM IF THEY HAD SEEN THE NO TRESPASSING, AND THE PRIVATE ROAD DO NOT ENTER SIGNS. BOTH STATED THEY HAD. I THEN ASKED THEM IF THEY REFUSED TO LEAVE WHEN ASKED TO DO SO BY KOONE. BOTH STATED THEY HAD REFUSED.

BOTH SUBJ'S WERE THEN CITED FOR TRESPASSING AND THEN RELEASED.

APPROX. 2 MILES DOWN FROM THE TOP OF THE AIR FORCE STATION THERE IS AN AREA CLEARLY MARKED AND VISIBLE AS YOU DRIVE UP THE ROAD INDICATING YOU ARE ENTERING PRIVATE PROPERTY. THE SIGNS POSTED STATE DO NOT ENTER, PRIVATE PROPERTY KEEP OUT, AND NO TRESPASSING.

W#1 STATEMENT

WOODY STATED HE WAS KEEPING HIS FRIEND COMPANY WHILE HE PATROLED THE DIFFERENT ENTRANCES TO THE AIR FORCE STATION PROPERTY. HE STATED THEY WERE CHECKING THE GATE ON THE MT. UMUNHUM ROAD SIDE WHEN TWO SUBJ'S ON A MOTORCYCLE SHOWED UP. HE SAID HIS FRIEND ASKED THE SUBJ'S TO LEAVE BECAUSE

THEY WERE ON PRIVATE PROPERTY. HE STATED THE SUBJ'S REFUSED TO LEAVE AND HIS FRIEND ASKED THEM SEVERAL MORE TIMES TO LEAVE AND THEY STILL REFUSED. HE STATED KOONE THEN ASKED HIM TO GO TO A NEIGHBORS HOUSE AND CALL THE S/O. WOODY STATED HE DID NOT HEAR ANYTHING KOONE WAS TELLING THE SUBJ'S BECAUSE HE WAS SITTING IN A VEH. BUT WAS ABLE TO HEAR A GOOD PART OF IT BECAUSE KOONE WAS SPEAKING VERY LOUD.

END REPORT (and a signature that looks like ) J CONTRERAS #260 (end of third page)

APPENDIX H

Portions of the Record Docket 195tr
IN THE MUNICIPAL COURT FOR
THE SANTA CLARA COUNTY
JUDICIAL DISTRICT
COUNTY OF SANTA CLARA,
STATE OF CALIFORNIA
KEVIN J. MURPHY, MUNICIPAL JUDGE
DEPARTMENT NO. 3

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
-vs-
NORMAN RICHARD VUNK, Defendant.

No. A8418595
M(1)PC602(H)(2)

ARRAIGNMENT
San Jose, California, July 23, 1984, 9:00 a.m.

APPEARANCES:

For the People:
For the Defendant: IN PRO PER
Official Court Reporters: JAMES R. JUGIYAMA

The following proceedings were had and evidence received:

THE COURT: Item 29, People versus Norman Vunk.

Sir, is this your correct name?

THE DEFENDANT: Yes.

THE COURT: Did you understand the advisement of rights which I gave earlier?

THE DEFENDANT: Yes.

Your Honor, I'm appearing as a special appearance, and not a general apearance to challenge the jurisdiction of the Court.

THE COURT: All right.

Before you challenge anything, did you understand the advisement of rights which I gave earlier?

THE DEFENDANT: Yes.

THE COURT: Now, what do you wish to say?

THE DEFENDANT: I'm here making a special appearance, and I'd like the record to reflect that I am making that special appearance. I'm waiving none of my rights.

THE COURT: All right.

You prepared to enter a plea at this time?

THE DEFENDANT: No, Your Honor.

Am I making a special appearance here?

THE COURT: Whatever you said is on the record.

I think ---

Are you an attorney?

THE DEFENDANT: No, I'm not.

THE COURT: You haven't done sufficient legal research. You've got several concepts confused. You can't really make a special appearance when you are the defendant in the case.

Now, you've indicated that you understood the advisement of rights. The next question is, what plea do you want to enter in this matter; and I advised you of the various options; what is your plea?

THE DEFENDANT: Are you telling me that I cannot challenge the jurisdiction of the Court?

THE COURT: Do you have some paperwork that you wish me to see?

THE DEFENDANT: Yes.

THE COURT: If you will hand that to the Deputy, I'll review the matter.

All right.

I read and considered the documentation that you presented me. In essence, you're contending the Court doesn't have jurisdiction for the reasons that you have indicated, and therefore, I assume, has no power to retain or process your case. You are incorrect as a matter of law, and I think, you need to consult an attorney from what I been able to read.

Back to the question of the plea; which plea do you wish to enter in this matter?

THE DEFENDANTA: Not guilty.

THE COURT: Is time waived?

THE DEFENDANT: Yes.

THE COURT: Have you been booked in this matter?

THE DEFENDANT: No.

THE COURT: I've got a note indicating that you refused to complete the pre-booking process. You have to be booked.

THE DEFENDANT: That's true, and I refuse to complete the pre-booking information.

THE COURT: Well, you're not going to do that?

THE DEFENDANT: No.

THE COURT: All right.

You're remanded into custody at this time. Have a seat in the jury box.

Bail will be set in this matter in the amount of $2,000.

You'll be booked in jail.

Matter will be continued for pre-trial until September 21 at 8:30.

If you're going to hire an attorney bring the attorney with you at the next court appearance.

Thank you.

APPENDIX H

STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

I, JAMES R. SUGIYAMA, HEREBY CERTIFY:

That I was appointed by the above-named Committing Magistrate to act as Official Court Reporter in the above-entitled action; that I reported the same in stenotype and thereafter transcribed the samt into longhand typewriting as appears by the foregoing transcript; that said transcript is a full, true and correct statement of the proceedings and evidence in said matter to the best of my ability.

/s/ James R. Sugiyama

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Official Court Reporter